

**United States
Circuit Court of Appeals
For the Ninth Circuit**

RAJOTTE-WINTERS, Inc.,

A Corporation,

Plaintiff in Error,

vs.

THE WHITNEY COMPANY,

A Corporation,

Defendant in Error.

Vol. I

Transcript of Record

**Upon Writ of Error to the United States District
Court of the District of Oregon**

ALFRED P. DOBSON, Casso Building, Portland, Oregon, and
WAKEFIELD & WITHERSPOON, Spokane, Washington.
For the Plaintiffs in Error.

DOLPH MALLORY, SIMON & GEARIN, and
EDGAR FREED, Mohawk Building, Portland, Oregon.
For Defendants in Error.

FILED

AUG 19 1924

F. D. MONCKTON

CLERK

INDEX TO PRINTED TRANSCRIPT OF RECORD

	Page
Amended Complaint	3
Amended Complaint (second).....	929
Answer	35
Assignments of Error	960
Bond on Writ of Error.....	963
Certificate of Clerk of U. S. District Court.....	969
Citation on Writ of Error.....	1

EXHIBITS

Plaintiff's ("3," "4," "6," "8," "9"	
and "10")	907-913 inclusive
Defendant's ("A," "C" and "D").....	913-918 inclusive
Judgment	920
Motion for Non-suit (at close of Plaintiff's case).....	903
Motion for Non-suit (at close of defendant's case).....	920
Motion to Strike Parts of Cost Bill.....	957
Opinion of the Court.....	920
Order Allowing Plaintiff to File Second Amended	
Complaint	928
Petition for Writ of Error.....	959
Reply	80

TESTIMONY

PLAINTIFF'S (OPENING)—

Frank Rajotte	Direct	87
	Cross	126
	Re-direct	192
	Re-cross	206
	Recalled	
	Direct	613
	Cross	628
	Re-direct	648
	Re-cross	655
	Re-direct	656
	Recalled	
	Direct	712

		Page
A. Fobert.....	Direct	212
	Cross	221
	Recalled Direct	303
	Cross	345
	Re-direct	404
	Re-cross	424
	Re-direct	451
Matt Glavin.....	Direct	222
	Cross	255
	Re-direct	301
Lyman Griswold.....	Direct	451
	Cross	458
	Re-direct	467
	Re-cross	469
Mark Sweeney.....	Direct	470
	Cross	482
	Re-direct	491
	Re-cross	494
	Re-direct	499
Dave Craft.....	Direct	500
	Cross	513
Vern Winters.....	Direct	515
	Cross	525
H. R. Martin.....	Direct	527
	Cross	545
	Re-direct	554
	Re-cross	559
	Re-direct	560
B. J. Parker.....	Direct	563
	Cross	575
	Re-direct	586
	Re-cross	588
	Re-direct	594
Wm. McKinley.....	Direct	595
	Cross	603
	Recalled Direct	658

		Page
Russell Hawkins.....	Direct	608
	Recalled Direct	657
W. J. Norris.....	Direct	662
	Recalled Direct	709
H. S. Huson.....	Direct	668
	Cross	676
	Re-direct	678
C. C. Donovan.....	Direct	680
	Cross	699
	Re-direct	700
	Re-cross	701

DEFENDANT'S (OPENING)—

W. J. Norris.....	Direct	716
	Cross	755
	Re-direct	810
	Re-cross	817
	Re-direct	829
	Re-cross	832
Wm. McKinley.....	Direct	844
	Cross	859
Russell Hawkins.....	Direct	861
	Cross	865

PLAINTIFF'S (REBUTTAL)—

Frank Rajotte.....	Direct	869
	Cross	873
	Re-direct	879
Matt Glavin.....	Direct	880
W. J. Norris.....	Recalled Direct	884
	Cross	890
	Re-direct	895

Writ of Error.....		965
--------------------	--	-----

100	100	100
101	101	101
102	102	102
103	103	103
104	104	104
105	105	105
106	106	106
107	107	107
108	108	108
109	109	109
110	110	110
111	111	111
112	112	112
113	113	113
114	114	114
115	115	115
116	116	116
117	117	117
118	118	118
119	119	119
120	120	120
121	121	121
122	122	122
123	123	123
124	124	124
125	125	125
126	126	126
127	127	127
128	128	128
129	129	129
130	130	130
131	131	131
132	132	132
133	133	133
134	134	134
135	135	135
136	136	136
137	137	137
138	138	138
139	139	139
140	140	140
141	141	141
142	142	142
143	143	143
144	144	144
145	145	145
146	146	146
147	147	147
148	148	148
149	149	149
150	150	150
151	151	151
152	152	152
153	153	153
154	154	154
155	155	155
156	156	156
157	157	157
158	158	158
159	159	159
160	160	160
161	161	161
162	162	162
163	163	163
164	164	164
165	165	165
166	166	166
167	167	167
168	168	168
169	169	169
170	170	170
171	171	171
172	172	172
173	173	173
174	174	174
175	175	175
176	176	176
177	177	177
178	178	178
179	179	179
180	180	180
181	181	181
182	182	182
183	183	183
184	184	184
185	185	185
186	186	186
187	187	187
188	188	188
189	189	189
190	190	190
191	191	191
192	192	192
193	193	193
194	194	194
195	195	195
196	196	196
197	197	197
198	198	198
199	199	199
200	200	200

**United States
Circuit Court of Appeals
For the Ninth Circuit**

RAJOTTE-WINTERS, Inc.,

A Corporation,

Plaintiff in Error,

vs.

THE WHITNEY COMPANY,

A Corporation,

Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District
Court of the District of Oregon**

CITATION ON WRIT OF ERROR

United States of America, }
District of Oregon. } ss.

To The Whitney Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of

the District Court of the United States for the District of Oregon, wherein Rajotte-Winters, Inc., a Corporation, plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 11th day of January, in the year of our Lord, one thousand, nine hundred and twenty-four.

R. S. BEAN, Judge.

STATE OF OREGON,)
County of Multnomah,) ss

Due service of the within Citation on Writ of Error is hereby accepted in Multnomah County, Oregon, this 11th day of January, 1922, by receiving a copy thereof duly certified to as such by Alfred P. Dobson, attorney for plaintiff.

(Sgd) EDGAR FREED,
Of Attorneys for Defendant.

Filed Jan. 11th, 1924.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON

July Term, 19—

BE IT REMEMBERED, That on the 17th day of October, 1923, there was duly filed in the DIS-

TRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, an Amended Complaint in words and figures as follows, to-wit:

AMENDED COMPLAINT

Comes now the plaintiff and by leave of court first had and obtained files herein its Amended Complaint and for cause of action against defendant alleges:

I.

That at and during all of the times hereinafter mentioned, plaintiff was and now is a corporation organized and existing under the laws of the State of Washington, having its principal office and place of business in the City of Spokane, said State.

II.

That at and during all of the times hereinafter mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Michigan, and having its principal place of business and office in the City of Detroit in said state.

III.

That on or about the 25th day of June, 1919, plaintiff and defendant made and entered into an agreement in writing wherein and whereby for the remuneration therein stated, plaintiff undertook and agreed to furnish all labor and perform all work necessary or as may be required of it to construct 12½ miles of railroad road bed in accordance with a certain map

and profile (which had prior thereto been submitted to plaintiff by defendant) from Tillamook Bay to Kilches River, thence up the Kilches River to Section three (3) Township one (1) North Range Nine (9) West W. M. in Tillamook County, Oregon.

IV.

That said above mentioned map and profile of said proposed road-bed which had been prepared by defendant's engineers, prior to the making and signing of said agreement, purported to show, within reasonable limits, the approximate amounts of the various materials to be moved and placed, and also the general character and amount of the work to be done in and about the construction of said road-bed; that prior to entering into said agreement plaintiff made an examination of the ground over which said railroad was to be constructed, as shown by said map and profile and from said examination made an approximate estimate of the amount of work to be done, also of the quantities of the various materials to be moved and placed, and also the cost of said work; that in making said estimates plaintiff assumed and had the right to assume, that in the actual construction of said road-bed there would be no considerable deviation from said map and profile, and that defendant had employed competent engineers and had caused said engineers to make and prepare a careful survey and examination of the ground over which said railroad was to be constructed, and that said map and profile so furnished to plaintiff had been prepared in accordance with

said information so obtained, and that it was feasible and practical to construct said railroad in accordance therewith, and that in the actual construction of said railroad said original map and profile would be substantially followed and adhered to.

V.

That as will more fully appear from the matters and things hereinafter alleged, no proper or sufficient examination or survey of the ground over which said railroad was to be constructed had been made by the defendant or its engineers at the time said map and profile was prepared and furnished to plaintiff as aforesaid; that plaintiff was not informed or in any manner warned or advised at said time that the line or location of said railroad as then established and as shown by said map and profile was not practical or feasible, and that in the construction of same many changes would have to be made and said map and profile would be deviated from in many respects and particulars and to such an extent as would greatly increase the total and unit cost of said work and prevent plaintiff from completing same within the time limit provided for in said above mentioned agreement; that after plaintiff had entered upon the performance of said work, changes were constantly being made which necessitated the moving and placing of greater quantities of materials, also the performance of considerable more work under more burdensome and expensive conditions than was contemplated when said contract was made and signed; that as a result of the

foregoing plaintiff's approximate estimates with respect to the quantities of the various materials to be moved and placed, also the cost of moving and placing same, were entirely too low and said estimates would not have been incorporated in said agreement had plaintiff been fully informed as to the character and amount of work to be done in the actual construction of said railroad as was required of it by defendant's engineers in charge.

VI.

That at the time said agreement between plaintiff and defendant was entered into, and at the time plaintiff entered upon the performance of said work provided for therein, one A. P. Cole was employed by defendant in the capacity of chief engineer and as such, had full and complete charge of said work to and until on or about the 10th day of October, 1919, when he was replaced by one W. J. Norris as such chief engineer; that the said A. P. Cole and W. J. Norris as such chief engineers, or one or the other of them, was at all of the times from herein mentioned the duly authorized agent of the defendant and one or the other of them was constantly present and in absolute charge of said work as it progressed; that neither of said engineers was sufficiently experienced to properly plan, direct or supervise said work; that said lack of experience was manifest in the very inception of said work; that in locating the line for the construction of said railroad, as shown by said map and profile so furnished to plaintiff as aforesaid, serious

and costly errors were made which necessitated many extensive changes as said work progressed from Station to Station; that as a result of said mistake in the location of said line of said railroad and other errors of judgment upon the part of defendant's engineers as said work progressed, which continued during all of the time plaintiff was engaged thereon, plaintiff was constantly being called upon to make changes which were not only costly and burdensome, but greatly delayed the completion of said work; that defendant's engineers were also constantly giving directions and instructions as to the manner and method of performing said work which were not only impractical, but were burdensome and expensive, causing needless loss of time and additional and unnecessary labor, all of which will hereinafter be more fully alleged and shown.

VII.

That shortly after plaintiff and defendant had entered into said above mentioned agreement, to-wit: on or about the 10th day of July, 1919, plaintiff proceeded to make adequate preparations for carrying on said work contemplated by said contract, to a successful conclusion, and within the time limit as provided for in said agreement; that plaintiff procured all necessary machinery, tools, and appliances, including a steam shovel plant, for the construction of said road bed, and moved and placed same upon the ground selected for the construction of same; and also provided itself with an adequate force of labor-

ers, and established a good and sufficient camp for their proper care and maintenance during said operations; that all of the aforesaid preparations were made to carry on the work contemplated by said original map and profile so furnished unto plaintiff by defendant as above alleged and all of said preparations were fully completed on or about the 1st day of August, 1919, when said construction work was actually commenced; that when plaintiff went upon said work for the purpose of perfecting its plans and preparations as aforesaid, it established its camps and located its machinery, steam shovel plant and other equipment in such manner as would insure rapid and efficient work; and all of said plans and preparations were made under the belief and on the assumption that said railroad would be constructed in accordance with said original map and profile, and that the materials to be handled on the various sections or stations of said work, also the depth, width, and extent of the cuts and fills would be as indicated or shown thereon, and that its steam shovel plant and other equipment could be located in such manner as would avoid its being moved back and forth upon said work, thereby avoiding unnecessary delays and expenditures.

VIII.

That after all of the aforesaid preparations had been made plaintiff, accepting said original map and profile as being substantially correct, when locating its steam shovel plant, planned to place same at about

Station No. 161, above Mile 1, and made no plans or preparations for using same in connection with the work to be done on Mile 1; that according to said original map and profile practically all of the work to be performed on Mile 1 (Stations 1 to 152-84) consisted of what is termed "light hand team and wheelbarrow work"; that said map and profile did not show or indicate that a fill would have to be made at about Stations one to four (1 to 4) for a warehouse site, or that the material for making same would have to be hauled a considerable distance, which would involve additional expensive track work; nor did said map and profile show that plaintiff would have to clear and grub said land upon which said warehouse was to be built, or any part of said right-of-way between Stations 0-00 and 9; that plaintiff was not informed that such additional work and labor would be required of it until after it had commenced its operations and had arranged and placed its forces and equipment for carrying on the work as shown on said original map and profile; that said warehouse site was located at about Station 1 to 4, and plaintiff's steam shovel plant was then located at about Station 17, and as there was no suitable material at hand for making said fill for said warehouse site plaintiff was required to and did haul all of said material from about Station 17, or a distance of about 1600 feet, which together with said additional track work required about 14 days more time and increased the cost of constructing that part of said right-of-way between Stations 0-00 to 26-25 from about 39 cents per

cubic yard, as originally estimated, to about 79c per cubic yard; that one of the principal causes for said increase in the cost of said work between said last above mentioned stations was the fact that plaintiff was required to move a portion of its forces and equipment from Station 161 to Station 3, to complete the clearing and grubbing of said warehouse site, also a part of said right-of-way adjacent thereto, which had been let by defendant's chief engineer, A. P. Cole, to certain subcontractors who were not equipped to do said work and who were by reason of said fact delaying plaintiff's operations in making said fill; that the necessary track for making said fill could not be laid until said right of way had been properly cleared and grubbed; that all of the afore-said operations, none of which could have been anticipated by plaintiff when entering into said agreement, not only increased the cost of said work between said Stations 0-00 and 26-25 about \$6220.00 over and above plaintiff's estimates, but delayed the progress of certain other work, which should have been completed during the early fall, to such an extent that it had to be done during the winter or rainy season, under very burdensome and expensive conditions, all of which will be hereinafter more particularly alleged and shown.

IX.

That some time during the latter part of November, 1919, and after plaintiff had, under the supervision of W. J. Norris, defendant's chief engineer,

completed all of that part of said railroad between Stations 0-00 to 26-25 also from Station 100 to 231 and had finished same to the grade shown on said map and profile, and as directed by said engineer, it was for the first time discovered that a part of said finished grade, to-wit: that part of same between Stations 107 and 122, was below high-water level; that upon discovering such condition plaintiff was directed by defendant's said engineer to immediately proceed with preparations for making a sufficient fill between said Stations 107 and 122 to raise said grade above said high-water level; that in order to make such fill it was necessary for plaintiff to move its steam shovel plant, which was then located at Station 231 back to Station 8 West (a distance of about $2\frac{1}{2}$ miles), which was the nearest and most accessible point where suitable material for making said fill could be obtained; that there was no material alongside or immediately adjacent to that part of said road-bed between said Stations 107 and 122 suitable for making said fill, nor was it possible to make said fill at said time by any means or method other than by the use and operation of said steam shovel plant, which under the extremely unfavorable weather conditions existing at said time was a very slow and expensive method; that before entering upon said work and before moving its steam shovel plant from Station 231 back to said Station 8 West for the purposes aforesaid, plaintiff explained to defendant's said chief engineer, that it was not feasible or practical to undertake such work at said time, and that

same should be deferred until weather conditions were more favorable; otherwise said operation would be very difficult, slow and expensive; that notwithstanding the existence of such facts and conditions and without due or any regard to plaintiff's opinions, advice or recommendations with respect thereto, and over plaintiff's serious objection, said engineer insisted that said work be done and that plaintiff proceed with same without delay; that thereupon plaintiff proceeded to move its steamshovel plant from Station 231 back to Station 8 West, which required about 2 days at an expense of \$200.00 per day; that the operation of said steam shovel plant at said Station 8 West was very difficult by reason of the fact that same had to be operated under about two feet of water during extremely cold weather, which caused said material to freeze when placed upon the cars, necessitating the employment of from twenty to thirty more men than was ordinarily used in the operation of same, thereby increasing the cost of making said fill about 60% in excess of what it would have cost had same been made under more favorable weather conditions; that the aforesaid operations were commenced on or about the 6th day of December, 1920, and were not completed until on or about the 15th day of January, 1921, and the cost of finishing said part of said grade was increased about \$5000.00 in excess of what it should have cost.

X.

Plaintiff was also required to perform a considerable amount of work in the construction of that part of said railroad between Stations 152-84 and Station 574-30 which could not have been anticipated when said agreement between plaintiff and defendant was entered into. In many instances the lien or grade was changed after plaintiff's operations were well advanced which invariably increased the amount of work to be done two-fold. That said changes, together with the many errors and mistakes of defendant's engineers in the supervision and management of said work made it impossible for plaintiff to carry on same in an expeditious and economical manner, as planned when said agreement was made and signed, all of which is more fully alleged and shown in detail as follows:

(A) That at the time plaintiff entered into said agreement it planned to have all of said work on said railroad between Stations 152-84 to Station 231 completed before the winter or rainy season had set in, but owing to the delays incident to many changes and extra work required of it in the construction of that part of said right of way between Stations 100-00 to Station 152-84 plaintiff was unable to do any of said work between said first above mentioned stations until sometime during the month of October; that there were a number of cuts and fills to be made between said stations and particularly between Stations 185 and 200, through wet and swampy ground; that practically all of the material to be moved in

this section consisted of what is commonly known as surface material consisting of yellow clay, decayed leaves, roots and other debris, which was very difficult and expensive to handle during the rainy weather; that this particular part of said work was made more difficult and expensive by reason of the fact that defendant's engineer in charge of same failed to provide proper or sufficient drainage; that during the heavy rains water accumulated upon said right of way between said stations which caused said grade to settle and made it necessary to haul rock from Station 231 to strengthen and build up said road bed from about Station 173 to Station 185; otherwise said railroad could not be kept open for the operation of trains in moving the necessary supplies and materials for said work beyond said Station 231; that had defendant's chief engineer provided proper and sufficient drainage for that part of said work and had plaintiff been able to perform same prior to the rainy season, as originally planned, said grade between said Stations 185 and 200 could have been constructed in about 7 less days and at a saving of about \$1600.00.

(B) That plaintiff was required to repeatedly change the grade between Stations 184 and 204 after same had been finished which involved about 3 days additional labor and increased the total cost of that part of said work about \$350.00; that had defendant's engineers been capable and efficient said grade could have been definitely established in the first instance; that all of said work between said stations was under the supervision of defendant's chief engineer, who

caused the grades to be checked at every station as said work progressed; that plaintiff relying upon the competency of said defendant's chief engineer and believing that the said grade as finished in the first instance was correct, moved its steam shovel plant forward thereby making it necessary to finish said grade by hand at a considerably increased cost as above stated.

(C) That in the construction of that part of said railroad between Stations 205-658 to 258-494 plaintiff was required to haul about 7000 yards of material from Station 250 to make a fill between Stations 237 and 248 or a distance of about 1300 feet; that in order to secure such material plaintiff was required to and did open up a borrow pit at Station 250 at an increased cost of about \$500.00, where plaintiffs' steam shovel plant was then being operated through a cut; that said operation, which was not contemplated when said agreement between plaintiff and defendant was made and entered into, required about 12 additional days time to make said fill and increased the cost thereof over plaintiff's original estimate about \$2000.00; that plaintiff's original plans for making said fill were based upon the assumption that all of the material for making same could be obtained alongside and adjacent thereto; that plaintiff, when making an examination of said part of said right of way in conjunction with said original map and profile preliminary to entering into said agreement between plaintiff and defendant, assumed and had the right to assume that defendant had obtained a right of

way over that part of said ground between said Stations 205-658 and 258-494 and that same was of the usual width, to-wit: of about 100 feet and that there would be ample material alongside of said Stations 237 to 248 to make said fill; that plaintiff was not informed to the contrary until after it had moved its forces and equipment upon said part of said work and had commenced its operations; that plaintiff was then informed that the right of way obtained by defendant across said ground was only about 40 feet in width which as defendant well knew was not sufficiently wide to enable plaintiff to secure said material for making said fill alongside or adjacent thereto; that all of the aforesaid changes, delays and additional work increased the total cost of said work between said Stations 205-658 to 258-494 about \$3500.00, and the unit costs about 20 per cent.

(D) That when plaintiff entered upon the construction of that part of said work between Stations 258-494 to Station 311-294 it assumed that same could and would be constructed substantially in accordance with said original map and profile, and proceeded to clear and grub said ground between said stations preliminary to the construction of said part of said road-bed; that after plaintiff had practically finished said clearing and grubbing, and had cleared about 4 acres, which required about 33 days, at a cost of about \$2500.00, defendant informed plaintiff that the line or right of way had been changed, and that it was necessary to construct said railroad farther up into the hills; that such change not only doubled the cost of

clearing and grubbing said part of said right of way, but increased the cost of constructing same about 30 per cent or about \$12,000.00; that had said railroad been constructed substantially as originally planned and over the line as shown by said original map and profile practically all of the materials to be moved between said Stations 285 and 311 could have been cast or dumped over the side of the hill or hills by the steam shovel; that after said line had been changed all of said material moved and handled between said stations had to be hauled on dump cars which required about 9 days more time and increased the total cost of said work about \$1800.00, and the unit costs about 20 per cent.

(E) That between Stations 311-294 and 384-964 plaintiff was required to build about 600 feet of switch or passing track, which was not shown on said original map and profile, nor was plaintiff informed of the necessity of building said additional switch or passing track until after it had commenced work upon said part of said railroad; that as the result of such change the cost of constructing said part of said railroad between said stations was practically doubled; that at the time plaintiff was informed of such change it had already cleared about 5 acres of said ground over which said right of way was to have been constructed before said change was made which required about 35 days time and involved an expenditure of about \$2600.00; that such departure from the original map and profile also necessitated the widening of the cut between Station 369 and 375

about 14 feet, in order to make room for a long switch or passing track, which required about 3 days additional time and increased the cost of said part of said work about \$700.00; according to the original map and profile said cut was to have been only 20 feet wide; that the cost of this part of said work was further materially increased because of the delay in moving plaintiff's steam shovel plant across Sam Downs Creek at Station 380; that when plaintiff reached said station said bridge was not completed and plaintiff was delayed about 2 days in moving said steam shovel plant to the work between Stations 311-294 to Stations 363-848, which delay added to the cost of said work about 20 per cent; that by reason of all of the aforesaid changes, delays and additional work, the total cost of said work between said last above mentioned stations was increased about \$6800.00 and the unit costs about 25 per cent; that a considerable part of the increased cost of said work between said stations was due to the fact that plaintiff's trains which were engaged in hauling said dirt from said cut were being continually held up by the bridge-men, who were at said time engaged in laying deck and tracks on the bridge over Sam Downs Creek at Station 380; that plaintiff was also delayed in the operation of its steam shovel plant about 6 days because of the failure of defendant to have said bridge across Sam Down's Creek at said Station 380 completed when plaintiff was ready to move said steam shovel plant upon said work to Station above 388; that all of the aforesaid changes, delays and addition-

al work increased the total cost of the construction of said work between Stations 366-848 and 384-964 about \$2800.00 and the unit costs about 22 per cent.

(G) That when plaintiff was ready to proceed with the work between Stations 384-964 to 416-664 it was informed that the line or right of way had been changed and that said railroad would have to be constructed further up into the hill; that plaintiff was also informed by defendant's chief engineer in charge that the remainder of said mile between said stations after crossing Sam Downs Creek at Station 380 was to be done by hand as an experiment; that by reason of the change in said line the material to be handled between said stations was much harder and had to be blasted before men could handle same, which would not have been necessary had said material been moved and handled by said steam shovel plant; that after plaintiff's steam shovel plant had crossed the bridge at Sam Downs Creek plaintiff was instructed to make a fill at the east end of said bridge over said Sam Downs Creek, and because of the fact that the cut at Station 389 had already been made by hand plaintiff was required to open up a borrow pit at said Station 389 for the purpose of making said fill; that had plaintiff been permitted to make said cut at said Station 389, with its steam shovel, as originally planned, all of said material moved and handled in making same could have been moved and placed in said fill at the end of said bridge across Sam Downs Creek for substantially the same cost as was incurred in completing said cut and making said fill; that said

changes, delays and additional work increased the total cost of constructing said mile between the first above mentioned stations about \$5000.00 and the unit cost about 35 per cent.

(H) That at the commencement of that part of said work between Stations 416-664 and 469-566 plaintiff was again required to depart from said original map and profile; that the line or right of way was, under the direction of defendant's chief engineer, moved or thrown farther up into the hills in order to reduce the grades and eliminate a number of heavy curves; this change made it necessary to haul a considerable part of said material in making said cuts and fills between said stations instead of dumping or casting same over the side, as was originally planned when said contract between plaintiff and defendant was entered into. That in order to move, handle and place said material in connection with the making of the cuts and fills between said stations a temporary standard track of about 1500 feet in length had to be constructed on said grade, which due to the heavy rains at said time was a very difficult and expensive piece of work; that due to the steep slopes in said cuts there were continual slides as the result of heavy rains which made it necessary to employ a number of men to keep said track clear and in a reasonable state of repair; that the material placed in the fills over which said temporary track was laid was softened by said heavy rains, causing said fills to settle and spread, which also necessitated the employment of a number of men to keep said

track in repair; that as the result of the foregoing additional work all of which, by reason of same having been delayed through no fault of plaintiff until the rainy season had set in, necessitated the performance of same under more difficult, burdensome and expensive conditions, than was contemplated and agreed upon, increased the total cost of constructing that part of said railroad between Stations 416-664 and 469-566 about \$7600.00, and the unit costs about 30 per cent.

(I) That practically all of the line or right of way between Stations 469-566 and 574-30 was also changed and thrown farther up into the hills and higher and steeper cuts were encountered which necessitated the moving and handling of above 7000 yards more material, also an overhaul of about 50,000 yards, when making cuts and fills between said stations than was shown on said original map and profile; that a considerable part of said material to be moved in making said cuts had to be hauled instead of being cast or dumped over the side, which increased the total cost of said work \$5600.00, and the unit costs about 30 per cent; that had plaintiff been able to cast or dump said material over the side practically all of said work between said stations would have been completed before the rainy season at a saving of about \$6000.00.

XI.

That as indicated by the following comparative statement the total quantities of the various materials

moved, handled and placed, also amount of clearing, grubbing and other work performed by plaintiff in the manner and under the conditions related in Paragraphs 1 to 10 above, was considerably in excess of what was shown on said original map and profile, or than was contemplated when said agreement for the construction of said railroad was entered into:

Actual Amount of Clearing and Grubbing Done by Plaintiff, also Quantities of Materials Handled.		Estimates as Shown on the Original Profile.	Excess over original Estimates as shown on Profile.
Clearing	64.79 Acres	49 Acres	15.79 Acres
Grubbing	38.15 Acres	15 Acres	23.15 Acres
Grading (Com) ..	183,381.4 Cu.Yds.	121,427 Cu.Yds.	61,954.4 Cu.Yds.
Grading (S.R.) ..	7,806 Cu.Yds.	3,340 Cu.Yds.	4,466 Cu.Yds.
Grading (I.R.) ..	1,587 Cu.Yds.	1,300 Cu.Yds.	287 Cu.Yds.
Overhaul	680,229 Cu.Yds.	179,500 Cu.Yds.	500,729 Cu.Yds.

XII.

That prior to entering into said agreement plaintiff made a full, careful and complete survey of said ground over which said road bed was to be completed, and based upon said survey and examination, in conjunction with the information disclosed by said original map and profile, so furnished unto plaintiff by defendant, made an approximate estimate of the amount of work to be done, also probable cost thereof, and amount of time it would require to complete same; that in making said estimates plaintiff assumed and had the right to assume that defendant's plans for the building of said railroad, as evidenced by said original map and profile, had been carefully considered and were substantially correct, and that after same had been accepted and acted on by plaintiff there would be no such material or extensive changes

or departures therefrom in the performance of said work as alleged and shown in the preceding paragraphs; and plaintiff further alleges that in making said estimates due allowance was made for a reasonable amount of extra or additional work as a result of changes in the alignment, grades, forms and methods of construction, and other unforeseen difficulties and contingencies, but did not and could not have anticipated any such increase in the amount of yardage or other work as is shown in said Paragraphs VII to XI above, and as is summarized in the comparative statement set out in Paragraph XI above; nor could plaintiff have anticipated the vast amount of additional work required of it as the result of the many errors and mistakes of defendant's engineers, or as the result of its being compelled to perform parts of said work under more difficult or burdensome conditions, than was contemplated when said agreement was signed.

XIII.

That under the terms and conditions of said agreement between plaintiff and defendant for the construction of said railroad road bed, plaintiff was required to complete the construction of same on or before the 1st day of January, 1920, and at a cost which would not exceed an agreed base cost which was to be determined by the mathematical process of multiplying the final pay quantities by the fixed and agreed unit prices for said work, all of which is fully provided for in said agreement; that because of the matters and things alleged and shown in the pre-

ceding paragraphs, and in conjunction with the fact that during the progress of said work plaintiff's forces were constantly being disorganized and rendered less efficient and its equipment rendered idle by said inefficient method of defendant's engineers in the direction and management of said work, plaintiff was unable to keep and perform its agreement in either of said particulars; that it was engaged upon said work from about the 1st day of August, 1919, until on or about the 1st day of August, 1920, or about eight months longer than was provided for in said agreement for the completion of said road bed as a whole; that the total cost of said road bed in so far as same was completed by plaintiff was two hundred thirty-two thousand, six hundred fourteen and 40/100 (\$232,614.40) dollars, and the base cost of said part of said work so completed by plaintiff as determined in the manner provided for in said agreement was one hundred twenty-four thousand, four hundred sixty-five and 56/100 dollars, (\$124,465.56); that had plaintiff been permitted to proceed with and carry on said work substantially in accordance with said original map and profile and under the condition originally contemplated, all that part of said road bed between Station 0-00 and 574-30 could have been completed within approximately seven months, at a cost of about one hundred thousand dollars (\$100,000.00) instead of two hundred thirty-two thousand, six hundred fourteen and 40/100 dollars (\$232,614.40) which was the amount actually expended in the construction of said part of said roadbed.

XIV.

That on or about the 1st day of August, 1920, and after plaintiff had completed all of that part of said roadbed up to and including Station 594-30 said work was taken over by defendant and plaintiff was relieved from any further responsibility in connection therewith or for the completion of the remainder of said railroad; that all of the work so performed by plaintiff in connection with the construction of said part of said road bed up to and including Station 574-40 was performed in a good and workmanlike manner and to the entire satisfaction of defendant's engineers, A. P. Cole or W. J. Norris, one or the other of whom was in absolute charge and control of said work from the time plaintiff entered upon the performance of said agreement until on or about the said 1st day of August, 1920; that at said time and when said work was so taken over by defendant no charge or claim was made by defendant, or anyone in, for or on its behalf, that plaintiff was in any way in default in the performance of said agreement or that said work so performed by it was in any way defective or unsatisfactory, and defendant on said date accepted all of said work and has ever since retained same and now enjoys the benefits thereof, and makes no claim or complaint of any kind or character that said work or any part thereof is in any way defective or that same was not performed in a good and workmanlike manner.

XV.

That said agreement between plaintiff and defendant is what is termed "cost plus a percentage agreement" and with respect to plaintiff's compensation contains the following provisions:

"On or before the first of each month the contractors shall furnish the Chief Engineer signed vouchers for all moneys spent by them on account of this work during the preceding month, and upon approval the Chief Engineer shall so certify thereon in writing, and upon such approval there shall be added a profit of five per cent (5%) to all such vouchers and the amount thus found shall on or before the 10th day of the following month be paid to the contractors by the owners, and the balance due by virtue of any further profit on said vouchers shall be retained by the owners until the completion and acceptance of the work and the final estimates have been made and within 30 days thereafter the owners shall pay to the Contractors the balance due by virtue of the profits.

"The contractors shall be reimbursed on all vouchers approved by the Chief Engineer and shall receive the face amount thereof.

"Hereto attached is a sheet entitled "Approximate quantities" such quantities having been made up from preliminary estimates and before accurate measurements could be made and the final or pay quantities (in each and every

item) may be more or less than these approximate quantities.

“To each and every item shown upon said approximate quantity sheet there has been affixed an agreed unit price and from these unit prices and the final or pay quantities there shall be determined a BASE COST for the complete work as a whole; then should the final cost of the complete work amount to more than the base cost the contractors shall pay 25% and the owners 75% of any increased cost above the base cost, (provided that the contractors in any case shall not receive less than 5% profit on the base cost) and in the event that the whole work costs less than the base cost, then the contractors shall receive 25% and the owners shall receive 75% of any such savings, (provided that the contractors in any case shall not receive more than 15% profit on the base cost).

That because of the numerous and vital changes made in the grade of said part of said road bed, insofar as same was completed by plaintiff, in conjunction with the many mistakes, errors and defaults of the defendant in the supervision and management of said work, as hereinbefore alleged and shown, plaintiff was required to perform a vast amount of additional work which was not considered or contemplated when said agreement was made and entered into, also to perform same under different conditions and at different times and in a different manner, and under much

more difficult and burdensome conditions than was contemplated or agreed upon when said agreement was made and signed, and by reason thereof, the above quoted provisions of said agreement with respect to plaintiff's compensation do not limit or control the amount thereof, and plaintiff cannot now be required to accept in full settlement of its services, a sum which would be equivalent to only 5% of the base cost of said part of said work so completed by plaintiff, or 5% of the total amount of plaintiff's expenditures as represented by vouchers rendered monthly to defendant during the time plaintiff was so engaged on said work, but in addition thereto is entitled to have and recover of and from the defendant as and for its compensation for the labor and services performed by it in and about the construction of said road bed so completed, such further sum as will when added to the profit heretofore paid plaintiff monthly during the progress of said work compensate plaintiff in full for said labor and services; that a reasonable compensation to be allowed plaintiff in full for its said labor and services, including said 5% heretofore paid, was and is a sum which in the aggregate would be equivalent to 15% of two hundred thirty-two thousand, six hundred fourteen and 40/100 (\$232,614.40) dollars, the total or final cost of said part of said roadbed so completed by plaintiff, or thirty-four thousand, eight hundred ninety-two and 16/100 dollars (\$34,892.16).

XVI.

That by reason of the foregoing defendant is indebted to plaintiff on account of the labor and services performed in the total sum of thirty-four thousand and eight hundred ninety-two and 16/100 dollars (\$34,892.16) no part of which has been paid, save and except nine thousand eight and 03/100 dollars (\$9008.03), in the amounts as follows:

July, 1919	\$ 206.69
August, 1919	597.41
September, 1919	584.55
October, 1919	902.13
November, 1919	693.51
December, 1919	375.85
January, 1920	466.72
February, 1920	431.52
March, 1920	500.14
April, 1920	673.81
May, 1920	1023.01
June, 1920	775.77
July, 1920	636.95
August, 1920	709.58
September, 1920	370.84
October, 1920	59.55

leaving a balance of twenty-five thousand eight hundred eighty-four and 13/100 (\$25,884.13) now due and unpaid.

XVII.

That prior to the commencement of this action demand was duly made upon the defendant for the

payment of the balance due on said statement, to-wit: twenty-five thousand, eight hundred eighty-four and 13/100 dollars (\$25,884.13) but defendant has failed, refused and neglected to pay same or any part thereof, and still refuses so to do.

FOR A FURTHER AND SEPARATE CAUSE OF ACTION against the above named defendant, plaintiff alleges:

I.

That at all of the times herein mentioned, plaintiff was and now is a corporation organized and existing under the laws of the State of Washington, having its principal office and place of business in the City of Spokane, said State.

II.

That at all the times hereinafter mentioned, defendant was and now is a corporation organized and existing under the laws of the State of Michigan and having its principal office and place of business in the City of Detroit of said State; and at all of the times hereinafter mentioned, was and now is duly authorized to transact and carry on the business for which it was formed within the State of Oregon.

III.

That on or about the 25th day of June, 1919, plaintiff and defendant made and entered into an agreement in writing wherein and whereby, for the remuneration therein stated, plaintiff undertook and agreed to furnish all labor and perform all work

necessary or as may be required of it to construct 12½ miles of railroad road bed in accordance with a certain map and profile (which had prior thereto been submitted to plaintiff by defendant) from Tillamook Bay to Kilches River, thence up the Kilches River to Section three (3) Township one (1) North, Range Nine (9) West, W. M., in Tillamook County, Oregon.

IV.

That thereafter, to-wit, on or about the 1st day of August, 1919, plaintiff entered upon the performance of said contract and proceeded with the construction of said road bed referred to therein, and continued upon said work until on or about the 1st day of August, 1920, when said construction work was taken over by defendant, and plaintiff was relieved from further performance of said contract.

V.

That between said above mentioned dates and during the progress of said work, plaintiff at defendant's special instance and request and for its sole use and benefit, made certain advances and expenditures for labor, material and supplies, also for tools and equipment and repairs thereto in connection with the construction of said road bed, amounting in all to eighteen thousand, nine hundred seventy-one and 90/100 dollars (\$18,971.90), all of which defendant agreed to repay within a reasonable time after same were so made; that there is hereto attached and marked Exhibit "A" and thereby made a part of this

complaint, a true and correct itemized statement of all of said advances and expenditures.

VI.

That there is now due and owing unto plaintiff from defendant, for said advances and expenditures a total of eighteen thousand, nine hundred seventy-one and 90/100 dollars (\$18,971.90), demand for which was duly made upon defendant prior to the commencement of this action, but defendant has failed, refused and neglected to pay same or any part thereof and continues so to do.

WHEREFORE plaintiff demands judgment against defendant:

1. For twenty-five thousand, eight hundred eighty-nine and 16/100 dollars (\$25,888.16) on its first cause of action, and

2. For eighteen thousand, nine hundred seventy-one and 90/100 dollars (\$18,971.90) on its second cause of action, and

3. For its costs and disbursements herein.

DOBSON & KRIMS,
Attorneys for Plaintiff.

EXHIBIT "A"

THE WHITNEY COMPANY, DR.

Statement of bills due as per contract.

Item 1	Camp equipment	\$ 2661.91
	10 Stoves	\$ 224.25
	Dishes, etc.	698.67
	Blankets	388.75
	Mattresses	45.00
	6 tents	709.93
	16 flys for tents.....	595.31
		<hr/>
		\$2661.91
" 2	Loading outfit at Port Angeles.....	325.00
" 3	Money advanced to Mark Sweeney..	2007.18
" 4	Money spent ballasting line.....	5344.70
" 5	Hiner & Reed repair bill.....	881.10
" 6	Credit due on tools returned to W. Co.	746.95
" 7	Loading material for track laying....	793.45
" 8	Repairs to outfit at Vancouver Yard	3500.00
" 9	Approximate percentage on groc- eries	2712.71
		<hr/>
		\$18973.00
Item 1	This was extra boarding house and camp equipment purchased by R. F. & W. to take care of additonal men, over and above the number provided for in contract.	

- “ 2 Additional charge for loading outfit at Port Angeles. This amount was not included in the charge for loading when bills were presented to Whitney Co.
- “ 3 Money advanced to Mark Sweeney who had contract from Whitney Co., for clearing right of way and putting in culverts. Contract made with Mr. W. J. Norris.
- “ 4 Money spent by R. F. & W. ballasting line, up to time work was taken over by Whitney Co.
- “ 5 To cover money paid to Hiner & Reed for repairs to Steam Shovel water tanks, while shovel was being held up waiting for bridge over Sam Down's creek.
- “ 6 Amount due on tools returned to Whitney Co. These tools were charged to R. F. & W. and used on track laying, then turned back to Whitney Co.
- “ 7 Charges for loading track material at Whitney yard.
- “ 8 Repairs to 1 steam shovel and 18 dump cars and 2 locomotives. This work necessary to put outfit in same state of repair as when it went on Whitney Co. contract.
- “ 9 For 5% on money spent by Whitney Co., on boarding house supplies, this amount arrived at by board deduction on pay-rolls from Dec. 1919, to Oct. 1920, deduction for board

amount to \$54254.45. R. F. & W. were not buying the groceries.

And prior thereto, to-wit, June 15, 1923, there was duly filed in said court an answer to plaintiff's complaint said answer thereafter, to-wit, on the said 17th day of October, 1923, being amended by inserting therein an additonail page designated as page 2a, and after being so amended pursuant to stipulation of the parties, was deemed to be an answer to said amended complaint.

(TITLE)

ANSWER

I.

Admits the allegations contained in paragraphs I and II thereof.

II.

Denies each and every allegation contained in paragraph III thereof except as hereinafter alleged.

III.

Admits that the plaintiff, prior to entering into said agreement, made an examination of the ground over which the railroad mentioned in the complaint was to be constructed, and except as so admitted and hereinafter alleged denies each and every allegation contained in paragraph IV thereof.

IV.

Denies each and every allegation contained in paragraph V thereof except as hereinafter alleged.

V.

Admits that on the 24th day of June, 1919, A. P. Cole was employed by the defendant in the capacity of "chief engineer" in connection with the work on the roadbed mentioned in the complaint, and that he so remained until in October, 1919, when he was replaced by W. J. Norris, and except as so admitted and hereinafter alleged, the defendant denies each and every allegation contained in paragraph VI thereof.

VI.

Denies each and every allegation contained in paragraph VII thereof except as hereinafter alleged.

VII.

Denies each and every allegation contained in paragraph VIII thereof except as hereinafter alleged.

VIII.

Denies each and every allegation contained in paragraph IX thereof except as hereinafter alleged.

IX.

Denies each and every allegation contained in paragraph X thereof except as hereinafter alleged.

X.

Denies each and every allegation contained in paragraph XI thereof except as hereinafter alleged.

XI.

Admits that under the terms of said contract the construction of the road bed described in the complaint was to be completed by the 1st day of January, 1920, that same was not completed until many months thereafter, and that the plaintiff prior to the 24th day of June, 1919, made a survey and examination of the ground over which said road bed was to be constructed, and except as so specifically admitted and hereinafter alleged, denies each and every allegation contained in paragraph XII thereof.

Amended by interlineation to read as follows:

XI.

Admits that the plaintiff prior to the 24th day of June, 1919, made a survey and examination of the ground over which said roadbed was to be constructed, and, except as so specifically admitted or hereinafter alleged, denies each and every allegation contained in paragraph XII thereof.

XII.

Denies each and every allegation contained in paragraph XIII thereof except as hereinafter alleged.

Amended by interlineation to read as follows:

XII.

Admits that under the terms of said contract the construction of the roadbed described in the complaint was to be completed by the first day of Janu-

ary, 1920; that the same was not completed by said date nor by October 1, 1920, when plaintiff ceased work on said roadbed; and, except as so specifically admitted or hereinafter alleged, denies each and every allegation contained in paragraph XIII thereof.

XIII.

Alleges that about the 1st day of October, 1920, the defendant itself took over the work on the roadbed mentioned in the complaint, and except as so alleged and hereinafter alleged, denies each and every allegation contained in paragraph XIV thereof.

Amended by interlineation to read as follows:

XIII.

Alleges that about the 1st day of October, 1920, the defendant itself took over the work on the roadbed mentioned in the complaint, and except as so alleged and hereinafter alleged, denies each and every allegation contained in paragraph XIV thereof.

XIV.

Denies each and every allegation contained in paragraph XV thereof except as hereinafter alleged.

Amended by interlineation to read as follows:

XIV.

Denies that the plaintiff is entitled to any sum whatsoever in addition to what it has already received to reasonably compensate it for labor and serv-

ices performed for the defendant, and denies each and every other allegation contained in paragraph XV thereof except as hereinafter alleged.

XV.

Denies that the plaintiff is entitled to any sum whatsoever in addition to what it has already received to reasonably compensate it for labor and services performed for the plaintiff and denies each and every other allegation contained in paragraph XVI thereof, except as hereinafter alleged.

Amended by interlineation to read as follows:

XV.

Denies that the defendant is indebted to the plaintiff in the sum of \$34,892.16 or in any sum whatsoever; denies that there is now due and unpaid from the defendant to the plaintiff the sum of \$25,884.13 or any sum whatsoever; and denies each and every other allegation contained in paragraph XVI thereof except as hereinafter alleged.

XVI.

Denies that the defendant is indebted to the plaintiff in the sum of \$41,115.44 or any other sum whatsoever, denies that there is now due and unpaid from the defendant to the plaintiff \$32,007.41 or any sum whatsoever, and denies each and every other allegation contained in paragraph XVII thereof, except as hereinafter alleged.

Amended by interlineation to read as follows:

XVI.

Denies each and every allegation contained in paragraph XVII thereof except as hereinafter alleged.

XVII.

Denies each and every allegation contained in paragraph XVIII thereof, except as hereinafter alleged.

For a FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION the defendant alleges:

I.

That on or about the 24th day of June, 1919, the plaintiff and the defendant entered into what is known as a "cost plus" contract by which the plaintiff undertook to construct for the defendant 12½ miles of railroad roadbed from Tillamook Bay to Kilches River, thence up the Kilches River into Section Three, Township One, north range Nine West, W. M., all in Tillamook County, Oregon, a copy of which contract, marked Exhibit "A", is attached hereto and made a part hereof.

II.

That there was submitted to the plaintiff by the defendant prior to the execution of said instrument a certain map and profile which proposed to indicate and did indicate the approximate alignment of said roadbed, and in a general and reasonably close way,

the character and amount of work to be done in the construction of said roadbed, and it was expressly stated to and clearly understood by the plaintiff that such map and profile was the result of a mere preliminary survey and proposed to indicate only approximately the alignment of said roadbed, and only in a general way the character and amount of work to be done in the construction of said roadbed.

III.

That in and by said contract it is provided:

“The Engineer assumes through this warning, that the Contractors have examined the ground over which the railroad is to be built, and knew at the time he entered into this contract the amount of work to be done, the difficulties to be encountered, the hardness of all materials to be moved, handled and put in place, together with all other work to be done and the quantities thereof to bring the railroad to a full and satisfactory completion by the time herein set forth for its completion.

“The Contractors accept this work, solely and unreservedly upon their own information, and without reference to any preliminary estimate of quantities, profiles, or other papers handed to bidders before the contract for doing this work is let and the Chief Engineer reserves the right to alter and change the alignment, grades, forms and methods of construction as shown on the

maps and profiles and he may increase or decrease any and all approximate **quantities** as shown on the preliminary estimate and the contractors hereby waive all claim to any anticipated profits, or damages owing to any such changes."

IV.

That the plaintiff prior to the execution of said instrument did in fact make an examination of the ground where said road bed was to be constructed as shown by said map and profile and made its own estimate of the amount and character of work to be done and the methods of construction that would be necessary, knowing and understanding that the alignment and grades on said map and profile were only approximate and not final or intended to be final and understanding and expecting that in the actual construction of said road bed, both the alignment and grade would be deviated from and changed within reasonable limits, and that on the basis of its own investigation so made as to the amount and character of the work, the nature of the materials to be moved, and the topography of land, the plaintiff entered into said contract.

V.

That the alignment and grades shown on said map and profile were, under the defendant's instructions, deviated from to some degree in the actual construction of the road bed, but the deviation and departure was inconsiderable and within the contemplation of the parties when they entered into said contract.

VI.

That said map and profile indicated approximately and within reasonable limits the character and amount of work necessary to be performed in the construction of said road bed according to the terms of said contract; and that if the amount or character of the work actually done exceeded or varied from the amount and character shown on said map and profile to a greater extent then was contemplated by the parties when entering into said contract, such was due to the inefficiency, incapacity, errors and mistakes of the plaintiff and its agents, to the fact that the plaintiff consistently and against the advice and instructions of the defendant excavated large quantities of material in excess of the amount necessary for the construction of said road bed according to said contract, and consistently and against the advice and instructions of the defendant hauled large quantities of materials a great distance beyond that which was necessary; to the fact that excavated material was frequently wasted, and the plaintiff's workmen idled on the job and to the fact that wasteful, inefficient and lazy practices were indulged in by the plaintiff, all again the requests and instructions of the defendant.

VII.

That at the time of the execution of said contract the plaintiff was familiar with the climatic conditions in the vicinity where said road bed was to be constructed and knew what character of weather to ex-

pect, and the weather encountered during said construction work was no different from the weather the plaintiff should have anticipated when entering into said contract.

VIII.

That plaintiff by reason of its incompetency, inefficiency and mistakes and lack of diligence, failed to complete said road bed on or before January 1, 1920, as was provided in said contract, and instead had by October, 1920, constructed only nine miles of said road bed, at which time, because of the incompetency, inefficiency and wastefulness of the plaintiff, the defendant itself under the terms of the contract and with the consent of the plaintiff took over the construction of said road bed, and thereafter the plaintiff did nothing further toward the construction thereof.

IX.

That for that portion of said road bed constructed by the plaintiff, the final cost of the labor and materials covered by said contract, including all expenditures by the plaintiff as evidenced by vouchers submitted to the defendant was \$156,508.59, and the plaintiff was fully reimbursed by the defendant for every cent of said sum expended by it and in addition was paid by the defendant as profit the sum equal to 5% of said \$156,508.59, namely \$7825.43; and that the base cost of said portion of said road bed constructed by the plaintiff, as determined in the

manner provided for in said contract, was less than \$156,508.59.

X.

That in and by said contract it is provided:

“On or before the first of each month the contractors shall furnish the Chief Engineer signed vouchers for all moneys spent by them on account of this work during the preceding month, and upon approval the Chief Engineer, shall so certify thereon in writing, and upon such approval there shall be added a profit of five percent (5%) to all such vouchers and the amount thus found shall on or before the 10th day of the following month, be paid to the contractors by the owners, and the balance due by virtue of any further profit on said vouchers shall be retained by the owners until the completion and acceptance of the work and the final estimates have been made, and within thirty days thereafter the owners shall pay to the contractors the balance due by virtue of the profits.

The contractors shall be reimbursed on all vouchers approved by the Chief Engineer and shall receive the face amount thereof.

Hereto attached is a sheet entitled “approximate quantities” such quantities having been made up from preliminary estimates and before accurate measurements could be made and the final or pay quantities (in each and every item),

may be more or less than these approximate quantities.

To each and every item shown upon said approximate quantity sheet there has been affixed an agreed unit price and from these unit prices and the final or pay quantities there shall be determined a BASE COST for the complete work as a whole; then should the final cost of the complete work amount to more than the base cost the contractor shall pay 25% and the owners 75% of any increased cost above the base cost (provided that the contractors in any case shall not receive less than 5% profit on the base cost), and in the event that the whole work costs less than the base cost, then the contractors shall receive 25% and the owners shall receive 75% of any such saving (provided that the contractor in any case shall not receive more than 15% profit on the base cost)."

XI.

That in and by said contract it is provided:

"Culverts and log bulkheads; the owners shall furnish all culvert pipe, and drift bolts for log culverts and bulkheads, f. o. b. Idaville, and the contractor shall receive, unload, cart, put in place or construct all culverts, log culverts and bulkheads, and the owners shall pay to the contractors the cost of all such work plus a profit of ten percent thereon, and such costs and profits shall

not be included in the base cost of the whole work."

That the defendant paid to plaintiff the full cost of all the work done by it under the last above quoted provision of said contract, plus a profit of 10% thereon.

XII.

That as provided in said contract the defendant paid to the plaintiff as rental for a steam shovel outfit and equipment the sum of \$1500 each and every month during all time the same was in use, said rental payments totaling \$21,500.

XIII.

That aside from said road bed contract the plaintiff and the defendant entered into an agreement by which the plaintiff undertook to lay the ballast on said road bed, and the defendant paid to the plaintiff the full amount provided for in said ballast agreement for all work performed thereunder.

XIV.

That aside from said road bed contract the plaintiff and the defendant entered into an agreement by which the plaintiff undertook to lay the track on said road bed and the defendant paid to the plaintiff the full amount provided for in said track-laying agreement for all work performed thereunder.

XV.

That a small amount of labor not covered by any of the contracts or agreements hereinbefore mentioned was furnished by said defendant, under an agreement between the plaintiff and defendant according to which the plaintiff was to furnish such labor when called upon and the defendant to pay the plaintiff therefor the cost thereof to the plaintiff plus a profit of 10% of said cost, and the defendant paid to the plaintiff the full amount provided for in said agreement for said labor furnished.

XVI.

That the sums paid to the plaintiff by the defendant for the services performed and labor and material furnished under said contracts and agreements and otherwise, were in each case the amounts provided for in said agreements and constituted a fair and reasonable and full compensation for the services performed and the labor and materials furnished, and the defendant has fully compensated the plaintiff for all work done and materials furnished for it under said agreements and on all other accounts.

For a SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE to plaintiff's FIRST CAUSE OF ACTION, the defendant alleges:

I.

That on or about the 24th day of June, 1919, the plaintiff and the defendant entered into what is known as a "cost plus" contract by which the plain-

tiff undertook to construct for the defendant 12½ miles of railroad road bed from Tillamook Bay to Kilches River, thence up the Kilches River into Section Three, Township One, North Range Nine West, W. M., all in Tillamook County, Oregon, a copy of which contract, marked Exhibit "A," is attached hereto and made a part hereof.

II.

That it is provided in said contract marked Exhibit "A" that the defendant's chief engineer "may take final notice as umpire in all questions, matters and things arising under this agreement, and his acts in the premises shall hold precedence to the rights of the contractors or any of his agents."

I. I.

That defendant's chief engineer has taken notice as umpire of and honestly and reasonably investigated and considered the claims of the plaintiff and the matters in dispute between the plaintiff and defendant in this action, and after said careful and honest investigation and consideration has determined, decided and advised that the plaintiff's claims in said respect are improper and unwarranted, that said contract marked Exhibit "A" was not deviated or departed from by the defendant or under the defendant's instructions or with its consent, that the construction was done under said contract and the defendant fully performed its obligations thereunder and fully and fairly compensated the plaintiff for all the services

performed and labor and materials furnished in said construction, and owes the plaintiff nothing.

For a THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE to plaintiff's FIRST CAUSE OF ACTION the defendant alleges:

I.

That between June, 1919, and October, 1920, plaintiff furnished certain labor and materials in connection with the construction of the road bed mentioned in the complaint and the laying of ballast and track on said road bed, and during all said times there were monthly statements rendered and settlements made between plaintiff and defendant on account thereof, and at such settlements itemized accounts were rendered and an account stated between the plaintiff and the defendant, and the plaintiff at no time until long after October, 1920, made an objection to said accounts or claimed that the defendant owed it additional compensation and the plaintiff is now estopped to deny the correctness of said settlements.

For a FOURTH FURTHER AND SEPARATE ANSWER AND DEFENSE to plaintiff's FIRST CAUSE OF ACTION, and by way of counterclaim, the defendant alleges:

I.

That the defendant is now and at all times herein mentioned has been a corporation duly created, organized and existing under the laws of the State of

Michigan and qualified to do business as a foreign corporation in the State of Oregon.

II.

That the plaintiff is now and at all times mentioned herein has been a corporation organized and existing under and by virtue of the laws of the State of Washington.

III.

Realleges the matters contained in paragraph 1 of the First Further and Separate Answer and Defense to plaintiff's First Cause of Action.

IV.

That the plaintiff entered upon the construction of said road bed, but prosecuted said work so inefficiently, incompetently and wastefully and with such an inadequate supply of labor and equipment that only a small portion of said road bed was constructed by January 1, 1920, whereas plaintiff could have and should have under the terms of the contract completed the road bed by that date; and only nine miles thereof was constructed by October, 1920, at which time the defendant by reason of the above mentioned matters took over the construction under the provision therefor in the contract and with the consent of the plaintiff. That beginning with the time the plaintiff entered upon the construction of said road bed, the defendant requested, urged and demanded that the plaintiff prosecute the same diligently and effi-

ciently and in accordance with the terms of said contract but the plaintiff steadfastly failed, and refused to do so and disregarded said requests and instructions of the defendant, and the plaintiff unnecessarily and in violation of the terms of said contract delayed the construction of said road bed for a period of many months beyond the time provided in said contract; that by reason of the aforesaid delay occasioned by plaintiff's disregard of the terms of said contract and the incompetent and inefficient manner in which said work was prosecuted, a certain steam shovel outfit and accompanying equipment mentioned in said contract was employed for nine months longer than would have been necessary had plaintiff prosecuted said construction competently and diligently and according to the terms of the contract, and during said nine months the defendant was required to pay as a rental on said outfit and equipment the sum of \$1500 per month, making a total of \$13,500; that in the course of the construction work the plaintiff unnecessarily and wastefully overhauled at least 93,150 cubic yards of material in excess of the amount required to be done, thereby causing the defendant an unnecessary expenditure of \$2,794.00, all in violation of the terms of said contract; and that in the course of said construction work plaintiff wastefully and unnecessarily excavated at least 13,984 cubic yards of common excavation in excess of the amount required to be done by it, thereby causing the defendant an unnecessary expenditure of \$9,788.80 all in violation of the terms of said contract.

V.

That the defendant duly made all payments required of it to be made under said contract and performed all acts and conditions required of its under said contract, except such as were waived by the plaintiff.

Defendant answers the SECOND CAUSE OF ACTION contained in plaintiff's complaint as follows:

I.

Admits paragraphs I and II thereof.

II.

Realleges the matter contained in paragraph I of the defendant's First Further and Separate Answer to plaintiff's First Cause of Action, and except as so alleged, denies each and every allegation contained in paragraph III of plaintiff's Second Cause of Action.

III.

Alleges that the plaintiff entered upon the performance of said contract attached hereto and marked Exhibit "A", and that about October 1, 1920, said construction was taken over by the defendant and the plaintiff was relieved of all further construction work under said contract, and except as so alleged, denies each and every allegation contained in paragraph IV of plaintiff's Second Cause of Action.

IV.

Denies each and every allegation contained in paragraph V of the plaintiff's Second Cause of Action.

V.

Answering paragraph VI of plaintiff's Second Cause of Action, the defendant denies that there is now owing from defendant to the plaintiff the sum of \$18,973.00 or any sum whatsoever for advances and expenditures or on any other account whatsoever, and denies that demand was made upon the defendant for said sum of \$18,973.00 or any other sum in excess of \$15,216.29, and except as admitted, denies each and every allegation contained in said paragraph VI.

WHEREFORE defendant prays that plaintiff take nothing by its complaint and that the defendant have and recover from the plaintiff judgment for the sum of \$26,082.80 and its costs and disbursements herein.

DOLPH, MALLORY, SIMON & GEARIN
and EDGAR FREED,

Attorneys for Defendant.

EXHIBIT "A"
CONTRACT

FOR THE CONSTRUCTION OF A RAILROAD
ROAD BED

under a

COST PLUS A PERCENTAGE AGREEMENT

From

Tillamook Bay to Kilches River, thence up Kilches
River into Section 3, T. 1 N. R. 9 W. in Tillamook
County, Oregon

—————000000—————

THIS AGREEMENT, made and entered into this the 24th day of June, one thousand nine hundred and nineteen, by and between The Whitney Company, a corporation, authorized to do business within the State of Oregon, "Party of the First Part" hereinafter called "Owners" and Rajotte, Fobert, and Winters, their, or his heirs, executors or assigns of the City of Spokane, Conuty of Spokane, State of Washington, "Party of the Second Part" hereinafter called "contractors."

NOW THEREFORE, in consequence of the covenants, agreements and payments to be made by the owners, the contractors hereby covenant, agree, undertake and promise to do all the clearing, grubbing, grading and finishing of the grade surface ready for track laying and ballast, and putting in all culverts and constructing all bulkheads and all other

work necessary to the finished grade, of twelve and one-half miles ($12\frac{1}{2}$) including passing tracks, wyes, and interchange track of railroad, complete in all its details, and give personal attention to and use his best knowledge and ability due to his past experience in similar construction, to prosecute the work as economically and without unnecessary expense, as may be consistent with substantial and workmanlike construction in each and every detail, and procure an efficient and experienced organization of overseers and workmen, and use his ability to keep harmony and good feeling among said overseers and workmen and towards the owners and owners' agents, and carry on the work uninterruptedly, and with such diligence and force so as to bring the road bed to a full completion on or before the first day of January, 1920, providing, however, that the owner shall upon the signed and written contract at once deliver to the contractors for construction purpose possession of the right of way over which the said road bed is to be built. Also provided that the owners keep the contractors well supplied with such materials and tools as is the owners' duty under this contract to supply.

In the case of strikes, fires, floods, and other uncontrollable causes due to nature, then the above time limit may be extended to an amount sufficient to cover any time lost through any such causes and the contractors waive all claim against the owners. Also the owners waive all claim against the contractors for any loss due to any such causes.

The contractors agree that a Chief Engineer as agent for the owners during the performance of the work covered by this contract, is hereby expressly authorized to superintend, design and direct the construction of and pass upon the quantities and qualities of all materials and workmanship, the manner in which any work may be done and the equipment and tools used thereon in each and every detail, together with all other matters incident to the work and he may take final notice as umpire in all questions, matters and things arising under this agreement, and his acts in the premises shall hold precedence to the rights of the contractors or any of the agents.

The Engineer assumes through this warning, that the contractors have examined the ground over which the railroad is to be built, know at the time he entered into this contract the amount of work to be done, the difficulties to be encountered, the hardness of all materials to be moved, handled and put in place, together with all other work to be done and the quantities thereof to bring the railroad to a full and satisfactory completion by the time herein set forth for its completion.

The contractors accept this work, solely and unreservedly upon their own information, and without reference to any preliminary estimate of quantities, profiles, or other papers handed to bidders before the contract for doing this work is let and the Chief Engineer reserves the right to alter and change the alignment, grades, forms and methods of construc-

tion as shown on the maps and profiles, and he may increase or decrease any and all approximate quantities as shown on the preliminary estimate and the contractors hereby waive all claim to any anticipated profits, or damages owing to any such changes.

Whenever it is considered more economical, the contractors may cause any work to be done by subletting same in sections, details or items to sub-contractors and station-men, and no work shall be done by the days work method that can be done by sub-contracting same, nor shall any part of the work be assigned, nor any part of the work sub-contracted to any person or sub-contractor not acceptable to the Chief Engineer.

All sub-contracts shall be made in accordance with such specifications and upon such forms and at such prices and to such persons as approved by the Chief Engineer, and all sub-contracts shall be executed in triplicate and delivered to the Chief Engineer, and upon approval he shall endorse his written consent thereon, keep one on file in his office and return the others to the contractors, and the contractors shall deliver one copy to the sub-contractor and keep one copy themselves. No sub-contractor shall be allowed payment for any work done on any portion of the work under this agreement until such above said sub-contract has been approved by the Chief Engineer.

No sub-contract shall under any circumstances relieve the contractors of their liabilities and obliga-

tions under their contract with the owners. Should any sub-contractor or station-men fail to perform the work undertaken by them, in a satisfactory manner, then the contractors shall immediately remove any such sub-contractor from the work upon written notice from the Chief Engineer that any sub-contractor's work is being unsatisfactorily done, or for any action of any sub-contractor or station-men that may be decided by the Chief Engineer as detrimental to the interests of the owners. Any agreement between the contractors and any sub-contractors of any station-men shall be deemed null and void, which in any way conflicts with this contract between the contractors and the owners for doing this work.

If at any time the owners should consider that the work is costing too much, or the Chief Engineer should be of the opinion and so certify to the owners, that the work or any part thereof is being unnecessarily delayed, or if the contractors are willfully violating the conditions of this contract or executing it in bad faith, or should they refuse or neglect to prosecute the work with sufficient labor or equipment to secure its completion within the time herein specified, then at the opinion of the owners this contract may be declared null and void, and upon giving the contractors forty-eight (48) hours notice in writing, then the owners may enter upon the premises and complete the work by any method they may elect, and the contractors shall cease to have any right in these premises and they shall receive no profit on any

work done or materials used or furnished after such nullification, but the contractors shall be entitled to the full amount due by virtue of all vouchers accepted by the Chief Engineer for all work done by him up to the time of such annulment, and the owners shall have the right to reject or retain and use any part of or the whole of any materials, tools, equipment, etc., and employ any and all persons engaged upon any part of the work at the time of such annulment, but the contractors shall, upon the completion of the whole work receive compensation as rental for any equipment owned by them and used upon the work at such prices as herein first agreed. Should the contractors abandon the work for any cause whatsoever, then they shall receive a profit of five percent (5%) only, on above said accepted vouchers. In the case the owners should for any cause elect to discontinue the work within four months after the date this contract comes effective, then the contractors shall receive full rent for the plant for the full period of four months.

The contractors shall furnish a complete steam shovel outfit, together with complete equipment for six station-men crews, including the following items:

1	Model 60 (2½) yard Marion	
	Steam Shovel	\$.....
2	14-ton Donkey Engines
18	4-yard Dump cars
20	1½ yard dump cars

3500 ft. of 35 and 40 lb. track and splice plates	-----
2 Switches complete	-----
2500 ft. of water pipe	-----
2000 ft. of 20 lb. track and splice plates	-----
1 steam pump and boiler or gas engine and pump	-----
13 head of horses with harness	-----
3 wagons	-----
6 slip scrapers	-----
6 Fresno scrapers	-----
2 Plows	-----
1 Water tank	-----
3 Wheel scrapers	-----
1 Complete blacksmith's outfit	-----
Complete camp equipment for 125 men, including tents, stoves, bedding, bunks, cooking and mess utensils, etc.	-----

together with any other items of equipment necessary to operate the above plant in an economical and effective manner, and the owners shall pay to the contractors the sum of fifteen hundred dollars (\$1500) per month as a rental for the use of above plant, and the owners shall receive said plant at Port Angeles, Washington, and load same on cars and pay freight therefrom to Idaville, Oregon, and upon the completion of the work, deliver said plant on the ground at Idaville, and the rental period shall be from the date of the bill of lading at Port Angeles, Washington,

until it is released by the owners and delivered at above said Idaville.

The contractors shall deliver the above said plant to the owners in good and first class state of repair, and subject same to the approval of the owners' Chief Engineer, and upon the owners releasing said plant back to the contractors, the plant shall be in the same state of repair as when received, wear and tear due to its having been used upon the work excepted.

Upon twenty-four (24) hours notice from the owners that the plant is no longer required upon the work, the contractors shall proceed with sufficient force and dispatch to immediately move said plant off the work and deliver it at Idaville ready for its releasal to the contractors.

The owners shall furnish "f. o. b. Idaville" all lumber, ties, nails, spikes, drift bolts, tracks, spikes, and bolts, fuel, lubricants, together with all small hand tools, such as shovels, picks, wheelbarrows, axes, saws, wedges, augers, drill steel, brush hooks and all other small hand tools except blacksmith and track laying tools, together with all powder, fuse and caps, and all materials going into temporary trestles and false work, and the contractors shall receive no profit on any of the above materials but the contractors shall receive on board cars or other conveyances, unload, cart and put in place or use all above materials, tools, etc., and be reimbursed for the cost of and receive a profit on any and all such unloading, carting, and putting in place as hereinafter stipulated.

The contractors shall give all their time and personal attention to the work or may (upon approval of the Chief Engineer) appoint one assistant, but neither the contractors nor said assistant shall receive any salary nor be reimbursed for traveling, incidental, personal or other expenses, neither shall they receive any reimbursement for office or overhead expenses, except those located on and directly connected with the work under this contract.

On or before the first of each month, the contractors shall furnish the Chief Engineer signed vouchers for all moneys spent by them on account of this work during the preceding month, and upon approval the Chief Engineer shall so certify thereon in writing, and upon such approval there shall be added a profit of five per cent (5%) to all such vouchers and the amount thus found shall on or before the 10th day of the following month be paid to the contractors by the owners, and the balance due by virtue of any further profit on said vouchers shall be retained by the owners until the completion and acceptance of the work and the final estimates have been made and within 30 days thereafter the owners shall pay to the contractors the balance due by virtue of the profits.

The contractors shall be reimbursed on all vouchers approved by the Chief Engineer and shall receive the face amount thereof.

Hereto attached is a sheet entitled "Approximate quantities," such quantities having been made up

from preliminary estimates and before accurate measurements could be made, and the final or pay quantities (in each and every item) may be more or less than these approximate quantities.

To each and every item shown upon said approximate quantity sheet there has been affixed an agreed unit price and from these unit prices and the final or pay quantities there shall be determined a BASE COST for the complete work as a whole; then should the final cost of the complete work amount to more than the base cost, the contractors shall pay 25% and the owners 75% of any increased cost above the base cost (provided that the contractors in any case shall not receive less than 5% profit on the base cost) and in the event that the whole work costs less than the base cost, then the contractors shall receive 25% and the owners shall receive 75% of any such saving, (provided that the contractors in any case shall not receive more than 15% profit on the base cost).

In the above mentioned final cost of the complete work, there shall be included every item of expense incident to the work, under this contract, including transportation of all men and equipment, rentals, cost of small tools, materials, fuels, lubricants, cookhouse and mess expense and repairs, together with profit received by the contractors and all other items of expense to the owners on account of the work covered by this contract, except the expense due to culverts, bulkheads and engineering.

Culverts and log bulkheads; the owners shall furnish all culvert pipe, and drift bolts, for log culverts and bulkheads, f. o. b. Idaville, and the contractors shall receive, unload, cart, put in place or construct all culverts, log culverts and bulkheads, and the owners shall pay to the contractors the cost of all such work plus a profit of 10% thereon, and such costs and profits shall not be included in the base cost of the whole work.

It is agreed that the rate to be paid for labor by the contractors shall not exceed the rates mentioned in the schedule of labor rates unless authorized in writing by the Chief Engineer.

If any class of labor not included in the above mentioned schedule shall be found necessary to the work, the contractors shall furnish same, and the rate to be paid shall be agreed upon by the Chief Engineer and the contractors in writing, and such agreement shall become a part of this contract.

If any equipment not included in the above mentioned plant shall be found necessary, the contractors shall furnish same and the rate of rental shall be agreed upon by the Chief Engineer, and the contractors, in writing, and such agreement shall become part of this agreement.

It is agreed that the owners may purchase, or rent, any equipment from any persons other than the contractors and the contractors shall use any such pur-

chased or rented equipment on the work and a rental for the use of any such equipment shall be charged against the work and shall be effective in the final base cost of the whole work and the rate of rental charges on any such equipment shall be agreed upon by the Chief Engineer and the contractors in writing, and the contractors shall receive no compensation whatever for using any such rented or purchased equipment.

Small hand tools not owned by the workmen and perishable equipment such as ropes, cables, picks, shovels, gaskets, drills and other small equipment shall be considered as a part of the actual cost to the work.

Such part of them as are in good and suitable condition at the completion of the work shall be taken back by the contractors at a fair price or at the option of the owners they may be taken by the owners or disposed of for the mutual benefit of the work.

AGREED UNIT PRICES AND PRELIMINARY ESTIMATE OF QUANTITIES:

	QUANTITIES	PRICES
Clearing	59.5 acres	\$180.00 per acre
Grubbing	17.84 acres	250.00 per acre
Common excavation, incl. 300 ft. haul,	146,600 cu yds.	.38 "cu.yd.
Solid rock excavation, incl. 300 ft. haul,	3,340 cu. yds.	1.55 " " "
Loose rock excavation, incl. 300 ft. haul,	1,300 cu. yds.	.70 " " "
Overhaul, per each 100 ft. hauled		
over 300 ft.	179,500 cu. yds.	.03 " " "

ROADBED:

The roadbed shall be 14' in width, excavation in solid rock shall be taken out one (1) foot below sub-

grade and back filled with earth or clay. Embankments made of common classification materials shall be fourteen (14) feet in width at sub-grade with side slopes of one and one-half ($1\frac{1}{2}$) horizontal to one (1) vertical.

Side ditches: In excavation on both sides of the roadbed and at the foot of the side slopes there shall be drainage ditches not less than one (1) foot in depth below sub-grade, with side slopes not less than one (1) horizontal to one (1) vertical, well cleaned out to allow for the free flow of water and insure good drainage to the cut.

Berm ditches: Where deemed necessary by the Engineer on either or both sides of any embankment for the purpose of sub-draining, the foundation of any embankment, there shall be ditches of such dimensions as determined by the Engineer. All berm-ditches shall be straight between the stakes, with side slopes smooth and said slopes not steeper than one (1) horizontal to one (1) vertical and well cleaned out to allow a free flow of water; no berm ditch will be allowed nearer than five (5) feet to the foot of any fill. All materials taken from any berm ditch shall be placed in the bottom of the fill and in no case shall it be wasted between the ditch and the right of way line. The Engineer may require berm ditches made before the embankment it is to drain is begun.

The Engineer may change any of the above dimensions, whether in excavation, embankments, or

ditches, should he consider that more efficient results be obtained by so doing, but in general the above dimensions shall hold.

CLASSIFICATION:

Materials shall be classified only as Solid Rock, Loose Rock and Common Excavation.

Solid rock shall include all rock in mass, or ledges in its original bed, or position, together with boulders in which the sum of its two girths, taken at right angle to one another, are equal to twenty-three (23) feet, and this shall be taken to equal one cubic yard. The above method shall be used as a distinguishing line between solid and loose rock only.

Loose Rock shall include slide rock, cement gravel, boulders and detached rock in which the sum of the two girths, taken at right angle to one another, are equal to two and one half ($2\frac{1}{2}$) feet and this measurement shall be taken to equal two (2) cubic feet. The above method shall be used as a distinguishing line between loose rock and common excavation only.

Cement gravel will be considered as rock ONLY when the aggregate or rock of which it is composed are cemented together "as near as can be determined" by chemical action of nature and then it shall be classified as solid rock, loose rock, or common excavation in accordance with its dimensions as above given for solid rock, loose rock and common excavation.

In no case will gravel be classified as rock which is stuck together by clay through pressure.

The Chief Engineer shall be umpire as to all classifications and his decision shall be final and binding to all parties to this contract.

Common Excavation shall include loam, clay, gravel, slide and loose rock and all other materials not included in the above classifications for solid and loose rock.

Free Haul: The above prices agreed upon for any of the classified materials shall include the hauling of any such materials a distance of three hundred (300) feet from the place of loading to the place of dumping and this shall be known as free haul.

Overhaul: For any of the above classified materials hauled a greater distance than the above mentioned three hundred (300) feet free haul, whether from a cut or borrow pit, an additional price per cubic yard for each one hundred (100) feet hauled after the first three hundred (300) feet free haul will be paid and shall be known as overhaul. The haul shall not be limited by any bridge or opening across or around which a reasonable load can be hauled.

The distance any material may be hauled shall be determined by dividing the unit price for common excavation by the unit price for overhaul and adding three hundred (300) feet thereto and said distance shall be the distance between the center of bulk of the cut and fill.

The distance any material has been hauled shall be determined by plotting and computing the distance between the center of bulk of the cut and fill and deducting three hundred (300) feet (free haul) therefrom, then for each one hundred (100) feet remaining shall be taken as one cubic yard of overhaul.

The distance any materials has been hauled shall be determined graphically by the Engineer on co-ordinate paper, and his determinations shall be final. The final overhaul quantities shall be denoted as a number of cubic yards hauled one hundred (100) feet and shall be paid for as such.

All excavated materials shall be measured and their quantities determined by averaging the end areas.

In no case will any material be paid for measured in embankments, but shall be paid for in excavation only.

Embankments shall be made from excavated materials, taken from the cuts, and embankments must be full width of the slope stakes at the bottom and fourteen (14) feet wide at finished grades with side slopes full and to a true slope and where there is a choice of material the best shall be used on top. The Engineer may require so much more material as may be needed to maintain the fills to profile grade shall be put on the side slopes and top of fills; this amount will be determined by the Engineer, being

allowed for shrinkage. No roots, stumps, logs, or vegetable matter shall be deposited in the embankments or fills, and in the case any equipment is used in hauling materials, necessitating temporary light trestles, the post sills and sway bracing may be left in, providing said posts and sills have a cross-section dimension not greater than eight (8) inches, and all sway and longitudinal bracing have a cross-section not greater than six (6) inches; and further provided that the tops of said posts and sway bracing shall not come within two (2) feet of the finished surface of the roadbed at sub-grade; also provided that all caps and stringers be pulled out at whatever depth below the surface of the roadbed may be; in no case shall caps and stringers be left in the embankments.

Culverts:

All culverts, whether concrete, vitrified tile or corrugated galvanized pipe, shall be laid to a straight line, where and as staked out by and as directed by the Engineer, on well packed earth or clay bed, with the earth or clay brought up around the sides at least eight (8) inches above the bottom of the pipe and well tamped before any fill materials are placed upon it.

In the case the ground where any culvert is to be placed is soft or boggy, then the soft or boggy ground must be removed to such a depth as the Engineer may deem necessary to insure a solid foundation and any such excavation shall be back filled with suitable material and well tamped to secure a solid founda-

tion for the pipe, that it may not sag and become low at the center from the weight of the fill over it.

Log Culverts: Where and in accordance with plans hereafter furnished by the Engineer there shall be constructed log culverts of such dimensions that the required size pipe can be slipped into them. All log culverts shall be made of suitable size, sound, peeled logs well made and drift bolted together and as directed by the Engineer.

Log Bulkheads: The face walls of all bulkheads shall have a batter of one (1) horizontal to six (6) vertical. All bulkheads shall be made of sound, suitable logs, and in no case shall any log be less than ten (10) inches in diameter at the small end. All face logs must have a length not less than two (2) spaces between the tie logs and as much longer as is possible to obtain them; the sill logs shall be large and securely bedded in their foundation to prevent settling; tie logs shall be notched or saddled and well fitted over the face logs supporting them, and to receive the next face log supported by them. Tie logs shall not be less than ten (10) feet long nor spaced more than twelve (12) feet apart with a crib log at least four (4) feet long supporting the face log between the tie logs. The tie logs must be staggered and not placed one directly over the other. Every fourth (4th) tier of tie logs must be drift bolted to the face log supporting it and secured to an anchor log with drift bolts at the inner ends. The outer ends of all tie and crib logs shall be sawn off at a distance of eight (8)

inches outside of the face of the bulkhead. If required, bulkheads shall be built, or brought up during the time the embankment it is to support, is being made. All logs going into bulkheads, must be peeled, well trimmed, sound Fir or Cedar.

Porous Tile: Should it be deemed necessary to put in porous tile at any place along the line of the roadbed, the owners shall furnish same f. o. b. Idaville, and the contractors receive, cart and put it in place, and payment therefore to the contractors as force account the same as for culverts. Tile must be laid to a true line, without sags or high places, through the entire length of the drain, and to such depth as required by the Engineer. On soft ground tile must be laid on 1 (X6) boards and care must be taken in backfilling that they do not lap one by the other transversely and that there is a clear unobstructed flow area equal to the diameter of tile throughout the entire length of the drain, and if required all joints must be wrapped with burlap to insure the above.

Finishing Grade:

Seven (7) feet from and on both sides of the center line of the roadbed and fifty (50) feet apart on curves and one hundred (100) feet apart on tangents, there shall be set finish stakes with tops kieleed or marked, and the finished roadbed shall be brought up to the top of said stakes and to a straight line between said tops throughout the length and breadth of the roadbed and the slopes of embankments must be full from

the tops of said stakes to the bottom of the slope stakes, and the finished surface of the roadbed must be left smooth and without bumps or depressions.

Waste:

No waste or spoil banks will be allowed above grade and no waste shall be deposited upon adjacent property owners' land, except through the written consent of such owners.

Clearing:

The surface of the ground must be cleared the entire width of the right of way between the stakes as set by the engineers on each side of the center line of the roadbed.

Clearing shall mean the felling of all standing trees and brush, bucking or cutting up into length and trimming the limbs off all felled or down trees, the piling of all bucked or other logs and the piling and burning or otherwise disposing of all limbs, tops, brush or any other perishable debris.

All logs deemed suitable by the Engineer for saw logs or for any use in the construction of the railroad shall be neatly piled on the right of way at such places that they will be entirely outside the excavation or embankment, and as the Engineer may direct.

Clearing shall include the falling and disposing of all trees or snags, either within or without the area of the right of way stakes, as the Engineer shall consider dangerous trees, and pointed out by him as such.

The progress of the clearing must be kept not less than three thousand (3000) feet ahead of the grading.

All brush must be cut off not more than ten (10) inches above the ground. In embankments, where the finished sub-grade comes within two (2) feet of the ground's surface, all stumps must be close cut to six (6) inches above said ground surface, and in any case no stumps shall be left standing whose tops are more than six (6) feet above the surface of the ground.

In no case shall any logs, tree tops, limbs, materials or debris of any nature be thrown or piled on any land adjacent to the right of way, except that a written and signed consent of such adjacent land owner may be obtained, to be used as a future protection to The Whitney Company.

Grubbing:

Grubbing shall mean removing from the ground to a distance of not less than two (2) feet below the finished roadbed, the piling and burning or otherwise disposing of all stumps, roots, embedded logs or other perishable materials not removed during the clearing within the area of the slope stakes and at other places as may be directed by the Engineer.

In no case will any excavated material be paid for in overbreaks, only the quantities within the area of

the cross-section stakes will be included in the final estimate of quantities.

Rate per hour. Rate per day. Rate per men.

Steam shovel engineer
 Steam shovel cranemen
 Steam shovel firemen
 Steam shovel watchmen
 Steam shovel pitmen
 Pump and water pipe line men
 Donkey engineers
 Brakemen
 Dump foremen
 Dump laborers
 Trestle Carpenters
 Trestle carpenter helpers
 Laborers
 Track laying foreman
 Track laying spikers
 Track laying laborers
 Water boy
 Cooks
 Cooks, second
 Waiters and dishwashers
 Locomotive engineers
 Locomotive firemen
 Blacksmiths
 Blacksmiths' helpers
 Powder man
 Powder man helper
 Teamsters
 Scraper and plow holders
 Stock tender
 Time keeper
 Time keeper assistants
 Storekeeper and material
 receiving man

Finally:

This contract is an agreement between the owners, the owners' Chief Engineer, and the contractors, to combine their forces, abilities and energy to prosecute the work in as economical way as is consistent with substantial construction, and it is understood that all work pertaining to the roadbed is to be constructed in a good and substantial manner and without unnecessary expense or delay.

AGREEMENT for the Construction of a Railroad Roadbed from Tillamook Bay to Kilches River, thence up Kilches River into Section 3, T. 1 N., R. 9 W., in Tillamook County, Oregon.

THIS AGREEMENT made and entered into this the 24th day of June, one thousand nine hundred and nineteen by and between The Whitney Company "Owners", a corporation authorized to do business within the State of Oregon, hereinafter called "Parties of the First Part" and Rajotte, Fobert and Winters, their heirs, executors, or assigns, of the City of Portland, County of Multnomah, State of Oregon, contractors, hereinafter called "Party of the Second Part."

NOW THEREFORE, in consequence of the covenants, agreements and payments to be made by the party of the first part, the party of the second part hereby covenants, agrees, undertakes and promises under a penalty hereinbefore expressed, to construct expeditiously, a railroad road bed, comprising about twelve and one-half miles of main line, sidings, wyes, and other track, from a point at Tillamook Bay on Kilches Point into Section 3, Township 1 North, Range 9 West, W. M., Tillamook County, Oregon, and deliver said road bed in fine state, ready for the track and ballast, bridges and trestles excepted, on or before the 1st day of January, 1920.

Provided, however, that the party of the first part shall upon the signing of these papers at once deliver

to the party of the second part, the right of way owned by the party of the first part for active construction work, in accordance with and as described in the foregoing stipulations and specifications, and as staked or laid out on the ground, and as directed by the Chief Engineer of the owners, acting as agent for the party of the first part.

And it is agreed that in consideration of the furnishing of materials, the complete and faithful performances and execution of the work of construction of said road bed, and the carrying out of this agreement and the specifications in accordance with their true spirit, intent and meaning, and by the date mentioned for completion of all work and to the full satisfaction of the party of the first part, then the said party of the first part agrees and does hereby bind itself to pay to the party of the second part the prices and in accordance with the stipulations as hereinbefore set forth, and in accordance with and in the quantities needed as hereinafter to be given and shown on the final estimate sheets as will be certified to by the Chief Engineer.

And it is further agreed that the party of the second part shall pay for all royalties or patent rights connected with or pertaining to any equipment used on the work, and the party of the second part agrees to furnish on demand or when necessary, certified evidence to the party of the first part that all such claims have been paid.

It is further agreed by all parties hereto that the attached agreements have been read and understood, and each and every paragraph and stipulation therein contained is agreed upon, and that they are hereby made part of this agreement.

IN WITNESS WHEREOF, the said parties hereto set their hands and seals this the 24th day of June, A. D. 1919.

Rajotte, Fobert and Winters (Seal)

Frank Rajotte (Seal)

Verne W. Winters (Seal)

Contractors, party of the second part.

Russell Hawkins (Seal)

President of The Whitney Company,
Party of the first part.

AS WITNESS HEREOF, I affix my hand and seal this the 24th day of June, A. D. 1919.

Wm. McKinlay,

Notary Public in and for the State of Oregon.

My commission expires August 1, 1921.

(Verified)

Filed June 15, 1923.

AND AFTERWARDS, to-wit, on or about the 17th day of October, 1923, pursuant to stipulation of the parties, plaintiff's reply to defendant's answer to plaintiff's original complaint was deemed to be a reply to defendant's first further and separate answer and defense to defendant's said amended answer.

(TITLE)

REPLY

Comes now the plaintiff and for reply to defendant's First Further and Separate Answer and Defense to plaintiff's First Cause of Action as set forth in its complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I.

II.

Admits that prior to entering into said agreement plaintiff was furnished with a map and profile of said work and that said map and profile indicated the approximate alignment of said road bed as then contemplated, also the amount and character of work to be done in the construction of same, but denies each and all other allegations therein contained.

III.

Plaintiff admits the existence of said provisions

Q. When and where was this, and who were of said agreement as quoted in said paragraph III, but with respect thereto alleges that all estimates of the amount and character of work to be done in the construction of said road bed were after making due allowances for reasonable changes in the alignment, grades, forms and method of construction, based on an examination of the ground over which said road

bed was to be constructed, as shown by said original map and profile; and plaintiff further alleges in this connection that the additional work and labor, also difficult and expensive conditions under which plaintiff was required to perform same, were not and could not have been contemplated or anticipated when entering into said agreement.

IV.

Replying to paragraph IV plaintiff admits that prior to entering into said agreement, it made an examination of the ground over which said road bed was to be constructed as indicated by said map and profile, and after making due allowances for reasonable changes and deviations therefrom made estimates of the amount and character of work to be done, but denies each and all other allegations contained in said paragraph IV.

Further relying to said allegations in paragraph IV plaintiff alleges that the great amount of additional work it was required to perform in the construction of said road bed was due entirely to the manner in which said work was conducted and managed by defendant and not to any default or failure of plaintiff to perform said agreement.

V.

Admits as is alleged in paragraph V that the alignment and grades of said road bed were under defendant's instructions deviated from, but denies each and all other allegations therein contained.

VI.

Denies each and all of the allegations contained in paragraph VI and the whole thereof.

VII.

Replying to paragraph VII plaintiff admits that it was in a general way familiar with the climatic conditions in the vicinity where said road bed was to be constructed, but alleges that the weather conditions would not have added materialy to the cost and expense of said construction work, but for the fact that a considerable part of the work which plaintiff, when entering into said contract had planned to do during the dry weather, had to be done during the worst of the rainy season, all of which is more fully alleged and shown in plaintiff's complaint herein.

VIII.

Plaintiff admits as is alleged in paragraph VIII that it failed to complete said road bed on or before January 1, 1922, and that only approximately nine miles of said road bed was completed by plaintiff, and that on or about October, 1920, defendant assumed the full and complete management of said work, but denies, each and all other allegations contained in said paragraph VIII.

IX.

Denies each and all of the allegations contained in paragraph IX.

X.

Replying to paragraph X plaintiff admits that the provisions quoted therein are substantially the same as contained in said agreement.

XI.

Admits each and all of the allegations contained in paragraph XI save and except the allegation that plaintiff has been paid the full cost of all work done in connection with the construction of said culverts and bulk-heads, which is denied.

XII.

Admits each and all the allegations contained in paragraph XII.

XIII.

Admits each and all the allegations contained in paragraph XIII, save and except the allegation that plaintiff has been fully paid for all work and labor expended in lying said ballast on said road bed, which is denied.

XIV.

Admits each and all of the allegations contained in paragraph XIV, save and except the allegation that plaintiff has been paid in full for the laying of said track on said road bed, which is denied.

Further replying to said allegations contained in paragraph XIV plaintiff alleges that defendant is indebted to it in the sum of seven hundred ninety-three

and 45/100 dollars (\$793.45) for additonal work and labor incurred in unloading and reloading of ties and steel for said track, which said additional expense was incurred by reason of the fact that defendant, contrary to the usual practice in such cases, shipped all of said ties and steel to said work before said road bed had been graded, or before same had been sufficiently completed to proceed with the laying of said ties and track in the regular and usual manner.

XV.

Denies each and all of the allegations contained in paragraphs XV and XVI and the whole thereof.

Replying to defendant's second further and separate Answer and Defense to plaintiff's First Cause of Action, plaintiff admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I and II, but with respect to the allegations of paragraph II plaintiff alleges that said quoted provisions of said agreement do not permit of any arbitrary ruling on the part of said engineer, whereby plaintiff would be deprived of the amounts claimed in its complaint herein.

II.

Replying to paragraph III plaintiff denies each and all of the allegations therein contained and the whole thereof.

Replying to defendant's third further and separate Answer and Defense to plaintiff's First Cause of Action, plaintiff admits, denies and alleges as follows:

I.

Admits as is alleged in said third further and separate Answer and Defense, that between June, 1919, and October, 1920, monthly statements were rendered and settlements made between plaintiff and defendant on account thereof, but denies each and all other allegations therein contained, and in this connection alleges that defendant was at all of said times informed and advised by plaintiff that it would expect and demand full compensation for all of said additional work and labor performed in connection with the construction of said road bed; that at no time was there ever any agreement that said statements as rendered constituted an account stated between plaintiff and defendant, but on the contrary defendant repeatedly informed and advised plaintiff that it would be fully paid for said additional work.

For reply to defendant's fourth further and separate Answer and Defense to plaintiff's First Cause of Action as set forth in its complaint herein, admits, denies and alleges as follows:

I.

Admits each and all of the allegations contained in paragraphs I, II and III.

II.

Denies each and all of the allegations contained in paragraphs IV and V and the whole thereof.

WHEREFORE plaintiff having fully replied to the Answer of the defendant, demands judgment as in its complaint.

(Signed) DOBSON & KRIMS,
Attorneys for Plaintiff.

(Verified)

Filed July 17, 1923.

(TITLE)

Be it remembered that on the trial of this cause on the 24th day of October, 1923, the Hon. R. S. Bean presiding, both parties appeared by counsel, and the parties hereto having by stipulation waived their right to trial by jury the following proceedings were had:

(TITLE)

BE IT REMEMBERED that this suit came on to be heard before the Honorable Robert S. Bean, Judge of the above entitled court, on Wednesday, the 24th day of October, 1923, at the hour of 10:30 o'clock a. m. of said day; plaintiffs appeared by A. P. Dobson, their attorney, and defendants appeared by Mr. John M. Gearin and Mr. Edgar, their attorneys.

WHEREUPON the following proceedings were had:

FRANK RAJOTTE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Dobson:

Q. Mr. Rajotte, in what way are you connected with the Rajotte-Winters Company, the plaintiff in this case?

A. President of the corporation.

Q. And how long have you held that office?

A. About seven years.

Q. That is practically the life of the corporation?

A. Corporation, yes; co-partnership before that.

Q. Now, Mr. Rajotte, just generally what business was this corporation engaged in, or has it been engaged in since its organization?

A. Why railroad construction, highway and irrigation.

Q. During all the time, the seven years?

A. Well, yes, during all the time.

Q. Does this corporation operate in a small way or is its business of a large character—magnitude?

A. Why, we have always been up to three or four million dollars worth of work every year.

Q. That is you are not small operators, small contractors?

A. Medium—fair operators.

Q. Now, Mr. Rajotte, prior to becoming connected with this corporation, what business were you personally engaged in?

A. Contracting; railroad contracting.

Q. Same kind of work; same character of work?

A. Same line.

Q. For how long a time were you engaged in that?

A. Twenty-three years.

Q. How many years?

A. Twenty-three years.

Q. Are you an engineer, Mr. Rajotte?

A. No. I have worked at engineering but I am not an engineer.

Q. You are just what is known as a practical contractor?

A. That is it.

Q. Mr. Rajotte, when did you first meet or talk to any one connected with the defendant in this case, that is the Whitney Company, concerning this work?

A. I met Mr. Hawkins in 1917.

Q. What and where was this, and who were present?

A. I met him here in the city and he told me he intended to build a line down in Tillamook County.

Q. What did he say to you and what did he ask you to do if anything?

A. Well, he said it looked most likely they would build a line, and it wouldn't be a bad idea for me to drop down sometime, and see their engineer down there.

Q. Did you follow out his suggestion? Did you do this?

A. Why, he told me again in 1918—

Q. Just before you pass that point. Did you go down at Mr. Hawkins' suggestion?

A. I did in 1918.

Q. You didn't go down until 1918?

A. 1918 made the first trip.

Q. Go ahead; just go ahead and state what you did.

A. In 1918, why I talked to Mr. Hawkins again, and he said that they had an engineer on the job down there, and if I had the time I ought to go down and look it over.

Q. Just before you pass on, Mr. Rajotte, what was the idea of your going down and looking over it at this time? What was the reason for it?

A. Well, was an idea of building it and as to the cost of it.

Q. Did you and Mr. Hawkins have any discussion as to the cost of this road at the time, before you went down? Did he make any comments about it?

A. No, not before.

Q. Go ahead.

A. I went down about the middle of the summer of 1918, and met Mr. Cole at Tillamook.

Q. In passing Mr. Rajotte, just tell the court who Mr. Cole is.

A. Mr. Cole is the Chief Engineer of the railroad for the Whitney Company, and I went out over the different points where he intended to build the line.

Q. Did Mr. Cole go with you?

A. Mr. Cole went with me and showed me where

he intended the line, from a place called Idaville, running east up over Kilches River, Clear Creek and down into the timber.

Q. About how much distance did you cover?

A. About six miles, six and a half, seven miles.

Q. In substance just what conversation did you have with Mr. Cole at this time concerning this road and its construction?

A. Well, in 1918,—in 1918 I talked with Cole in regard to the kind of line he wanted; he wanted an ordinary inexpensive logging road, which he said would follow the contour of the hills up there, and hit the flat from Kilches to Idaville.

Q. Now, when you say hit the flat, just explain what you mean by that.

A. Construction on the lower end was less expensive than the upper, the way it looked.

Q. What was the character of the contour of the land as compared with the upper end?

A. Well, it was a flat; low flat country, and crossing the Kilches, you had a hillside from there up.

Q. When you say a hillside, was it a series of hills or ridges, or was it one hill?

A. It was a continuous not very large broken hill.

Q. Referring back, Mr. Rajotte, for a minute, this first part of the work you say was on the flats. What conversation did you and Mr. Cole have as to the grades to be put through there?

A. Well, we spoke about—he asked me what kind of equipment we carry, and I told him—this was

in 1918—I told him the kind of equipment we carried, and we looked over the bay, the work up to the crossing of the Southern Pacific and from there on up to where the grave-yard was and another three-quarters of a mile from there on again. We figured that was pretty much team and wheel barrow work and scraper work.

Q. To get this straighter: The first two or three miles of this work was practically flat; is that true?

A. It was light grade.

Q. That part of the work you want the court to understand was what is called light hand and team work?

A. Yes.

Q. Go ahead.

A. Or work that would run up to seven or eight or nine thousand dollars a mile.

Q. Was that the estimate of the entire work as a whole or just the first few miles?

A. The kind of a line we talked about at that time.

MR. FREED: Mr. Dobson, are you having the witness tell the court what Mr. Cole told him?

MR. DOBSON: Yes.

MR. FREED: We think the contract and these preliminary maps will best show that.

COURT: This is preliminary I suppose; will get to the contract later.

MR. DOBSON: The materiality of this may not show at this time, but it will later.

A. We went into details as to the line up, or

could the line be done from eighty to one hundred thousand dollars, in regard to operating and picking a suitable plan to put it through the cheapest way possible.

Q. I want to go back to the character of the work talked about on the line when you said you run through there. Just explain to the court what you had in mind about that.

A. The first two-and-a-half miles or three miles would run about three and four foot cuts and three and six foot fills and very light work, with the exception of two cuts, one we call the Grave-yard cut, and a small cut at Kilches River. Across that was a flat, before we hit the hills proper. From there on we figured to send a machine through there to get away from the rains in winter, to get that work going ahead; if not we couldn't get the work done in the time they wanted it done. That was the sole intention on these parts and we could get that work done no other way; if we didn't go in in the fall and send the machine through; we both agreed on that.

Q. Mr. Rajotte, aren't you referring to a later conversation? I want to get at this point so the court will understand preliminary to the main testimony, the work that you were considering as explained later by Mr. Cole.

A. Yes, but he took up the style of the machine that he wanted in 1918, and took up the different cast and reach of the steam shovel.

Q. The court don't understand what you mean by cast. I want you to explain to the court the dif-

ference in the operation of casting and other operations finally done. The court doesn't understand.

A. Why, there is a way of operating the shovels where you load no material whatever, and fix the contour to suit the machines and still get the uniform curvature suitable for a logging road, logging line; that is such a logging line as the Shay Engines and logging cars take—in other words, faster grades and slower grades and very heavy curvature, but the alignment can be so suited on this kind of hillside work there is very little overhaul, that is not much material to be loaded and hauled; very large cast and very cheap way of doing the work; the cheapest material we move. That is the idea we had of sending the engine up at that time—sending her in ahead with no equipment.

Q. Now, Mr. Rajotte, I don't want to spend much time on this but I want you to tell the court what the casting operation means, and what the hauling operation means in these hills with a steam shovel.

A. Your Honor, to cast with a machine, probably to carry a line would be about twelve men and your capacity is about—I would say the capacity of the machine would be in casting about three thousand yards, where in loading it would cut it down in this kind of cuts to say maybe four or five hundred yards, and the cost of operation with four or five hundred yards, and the cost of operation with four or five hundred would be about twelve to one maybe; where it would only run sixty to eighty dollars on a

cast job, it might take four or five hundred dollars on a loading proposition and dumping.

Q. The hauling proposition; what additional work besides?

A. Involved loading, putting up trestles for dumping; dumping and hauling the material and putting in track.

Q. Now Mr. Rajotte, subsequent to this visit with Mr. Cole over the line and this conversation, when did you next speak to any one connected with the defendant in this case concerning this work?

A. I talked with Mr. Hawkins when we came back from Tillamook about the building work.

Q. What was said in that conversation if anything that would have any bearing upon the controversy here?

A. He asked me what my idea was regards cost, and I told him, agreeing with Cole's idea, I thought he could get the line in there for about one hundred thousand dollars.

Q. What do you mean by agreeing with Cole's idea?

A. The kind of a logging road Cole wanted to build, and his way of operating it—that he wanted it.

Q. And that is all that was said at that time?

A. That is all that was said.

Q. Mr. Rajotte, coming to the meeting just prior to the making of this contract in controversy here in 1919, when did you talk to any one in the company, that is the Whitney Company?

A. I talked with Mr. Cole again and—

Q. When did you see Mr. Cole?

A. I went down in the early spring of 1919.

Q. And why did you have to go down there at this time?

A. Why Cole was in Portland, and he told me he had a little more profile for the work down there and he was acquiring some—he had acquired some property and that I could have a better look at the line-up at this time.

Q. Did you go over the work at this time with Mr. Cole?

A. No, I just went to the Kelsey River and looked at the Grave-yard cut.

Q. You went over part of it, didn't you?

A. Just back, and back to the bay again.

Q. Did Mr. Cole accompany you?

A. Yes, sir.

Q. Did Mr. Cole have any discussion at this time as to the character of the road bed that was contemplated?

A. Yes, sir.

Q. What was the conversation?

A. He had the same idea, just the ground work on the line, ordinary ground logging line, across the Southern Pacific tracks, and on about as far as Kilches, and he had the same ideas we both had of doing the work ahead, and setting the machine in across the Kilches River, and sending it in ahead to work both operations at the same time, scratch work, and work ahead.

Q. Did he state this at the time Mr. Rajotte, the

reason for doing the work in that manner?

A. Yes, sir.

Q. What was that?

A. If we were to be ahead in the winter, we couldn't accomplish anything, we couldn't get the work done in the time we wanted if we didn't place the machine up ahead there. It couldn't be done.

Q. Why couldn't it be done? Did you and Mr. Cole discuss that as to why it couldn't be done?

A. The river was coming up, the creeks and everything, and you can't accomplish.

Q. Would it affect the material in any way?

A. Oh, the material would be sticky, it would slacken you up.

Q. About what per cent?

A. Probably seventy-five or eighty per cent.

Q. Did you and Mr. Cole discuss the cost of this particular thing at this time?

A. Yes, we discussed the cost.

Q. What was said about the cost of this particular thing?

A. We had a talk regarding unit prices, that is, I talked unit prices with him. At that time he told me they intended to let a contract, and that he would like to see me have the contract, as I suited him on the line-up of doing the work, and I gave him approximately the unit—

MR. GEARIN: If the Court please, he is going very much afield on this conversation with Cole preliminary to execution of the contract.

COURT: I think should get to the contract.

Mr. Gearin: We are not bound by this, you understand.

Q. Now, following this visit to Mr. Cole down there, what did you do next?

A. I came back to Portland.

Q. And when did you next have an interview with the defendant, or its officials concerning the making of this contract?

A. Why, they put out requests for bids.

Q. Did you bid on the work?

A. No.

Q. What I want to get at, Mr. Rajotte, is the meeting you had with the defendants here or their officials, immediately prior to the making of this contract. Do you recall that meeting?

A. Yes.

Q. Who did you meet with?

A. I met Mr. Hawkins in the Lewis building in his office. He sent for me.

Q. Just what conversation took place with Mr. Hawkins at this time?

A. Why, he said—he asked me if we couldn't get together and fix up some kind of a contract to do this work, and I told him I thought we could. And we talked over different things about the contract, and Mr. Cole was there, and Mr. Hawkins told Mr. Cole for us to get together and fix up a contract, told Mr. Cole to fix up a contract.

Q. Did you do that?

A. Yes, our man Mr. Cook and Mr. Cole fixed the contract.

Q. Well, did you and Mr. Cole get together after this conversation with Mr. Hawkins, and determine—discuss and consider the terms of the contract that you were going to make?

A. We talked it over a little.

Q. Now, particularly, Mr. Rajotte, with respect to the unit prices referred to in this agreement, did you and Mr. Cole agree upon those?

A. We agreed on the unit prices, yes.

Q. Now, these unit prices as embodied in the contract, were they representing the actual cost?

A. Actual cost.

Q. Did they contemplate any profit to you?

A. No profit.

Q. Those prices—that was just the working basis?

A. Working basis.

Q. Now, Mr. Rajotte, before you entered into this contract, which was in June, some time in June—do you remember the date of the engineering contract?

A. Contract, June 24th.

Q. It is admitted June 24, 1919. Now, before this date, and at this time that you went over these contracts with Mr. Hawkins and Mr. Cole, did you have a profile?

A. Before that date did I have a profile?

Q. What I want to know is, when did you first see the complete profile of this work?

A. When I received the request for the bids.

Q. Did you at that time get a complete profile?

A. Yes.

Q. Was that the first occasion you ever saw a complete profile of the work?

A. Yes.

Q. And about what date was that?

A. That would be about, I would say, a week before the call for the bids. Would be about a month, maybe, before the letting.

Q. Before you entered into this contract?

A. I think so.

Q. That would be some time in May?

A. Would be some time ahead of that.

Q. At this time, Mr. Rajotte, I show you what purports to be profile of this road, and will ask you to state whether or not this is the profile that was handed to you, or given to you by the defendants?

A. Oh, that is the profile we had.

Q. You have examined it, you know what that is?

A. Yes, I know.

Q. And from whom did you receive it?

A. Mr. Cole.

Q. Where were you when you received this? On the work or some other place?

A. Portland Hotel.

Mr. Dobson: Have you any objections, Mr. Freed?

Mr. Freed: We have no objection if that jibes with the profile we offer. I presume it does.

COURT: Subject to correction.

MARKED "Plaintiff's Exhibit 1."

Q. Now, Mr. Rajotte, when you entered into this

contract had you examined this profile carefully, the one that is referred to as Plaintiff's Exhibit 1?

A. Yes, fairly so.

Q. And did you carefully check the various quantities shown, and the materials, different materials shown on that profile?

A. I looked the quantities over on the profile, yes, in regard to the time to get the work done.

Q. And did you note, as indicated on the profile, the various marks as indicated, the character and kind of work to be done?

A. Yes, sir.

Q. And in making your bid, did you consider this profile, and consider the information as disclosed by the profile?

A. Yes, sir.

Q. Did you also consider in conjunction with it the conversation you had with Mr. Cole?

A. Yes, sir.

Q. And then when you entered into this contract you did so in the light of the information you had obtained from the profile and examination of the work, and your talks with Mr. Cole. Is that correct?

A. I overlooked the profile very carefully, and looked over as to the way that Mr. Cole would allow me to get at that work, to get it done in the time.

Q. That is what I meant when I said you considered your conversation with Mr. Cole in conjunction with the information disclosed by the profile?

A. When I put in these prices, I figured that Mr. Cole agreed with my manner of doing the work, that

is, I had to agree with Mr. Cole or he didn't want me on the job. There was a machine going in ahead, and that was the main idea of the whole job.

Q. Now, Mr. Rajotte, you read profiles and understand profiles readily, don't you?

A. Fairly good.

Q. And you have built logging roads before you built this one?

A. Yes, sir.

Q. Have you built what is called standard roads?

A. Standard gauge roads, yes.

Q. Will you just state to the court generally the manner in particular these two road beds would differ in the manner of construction.

A. Logging roads and standard roads?

Q. Yes.

A. Well, in a logging road you would probably get sixteen or eighteen degree curve; on good standard roads like the S. P. and S., you get a three degrees. You have a very light grade, where in the logging road you get as high as eight per cent.

Q. Now, Mr. Rajotte, was there anything on this profile to indicate whether this was to be built as a standard road or as a logging road?

A. It was a logging road survey.

Q. How did you know that from the profile, Mr. Rajotte?

A. Well, looking at the curvature, and bridges, and different alignments.

Q. In other words, this profile referred to as Plaintiff's Exhibit 1, does that indicate the curves?

A. Yes, that indicates the curves.

Q. Did you note that at the time you were considering making this contract?

A. Yes.

Q. Did that indicate to you that it was merely a logging road?

A. Merely a logging road, following the contour of the land.

Q. Now, Mr. Rajotte, after you had made and entered into this contract, just what was done? What did you do?

A. Why, started the boys out on the job to line up a plant and get it going.

Q. Did you have anything to do, particularly, with that yourself?

A. Yes, sir.

Q. With whom did you confer following the making of this contract with reference to going on with the work?

A. With Mr. Cole.

Q. And did you and Mr. Cole discuss the manner in which you would proceed with it?

A. We did.

Q. Will you just state to the court in substance the conversation had with Mr. Cole?

Mr. Gearin: That is going too far. We must object to this going any further before the execution of the contract. Let's get at the contract.

Mr. Dobson: This was after; oh, I beg your pardon.

A. Mr. Cole—our main object, as I said before,

was to get the plant across the Kilches River up to Station 250, and get her started out there, with no rigging with it, just a bare plant, and he thought that was best, to put the machine in at Station 154, Graveyard Cut, and put the machine in there, and do six or seven thousand yards there on account of that being a thorough cut. By that time we would have plenty of time to get across the river. Not on a bridge, just across on a little cribbing. The river was low then, and get to Station 250, and that was the lineup for the work, except at the lower end we were to put in teams, wheelbarrows and picks and shovels, and start that in.

Q. You say in the first place your plan as to the steam shovel was Station 250?

A. First of all was 250, above Kilches River. That was the first plan. Then he wanted me back to 154 at the Grave-yard Cut.

Q. Did you and Mr. Cole finally agree that would be the starting point for the steam shovel?

A. 154 we agreed for the starting point.

Q. Mr. Rajotte, so the court will understand, about how many miles, or what is the distance from the beginning of the line to Station 154?

A. Station 154; well, we started at one hundred; that is 154 station, a mile two hundred feet from the S. P. track.

Q. Approximately how far would it be?

A. Well, from the beginning of the work was a Y. That would be one and a half miles.

Q. Was there any plan contemplated at that time

for using the steam shovel plant before Station 154?

A. No.

Q. Just go ahead and state a little further your conversation with Mr. Cole at this time with respect to getting the steam shovel plant further up on the work.

A. You mean on up ahead?

Q. Yes.

A. When we started?

Q. I am referring, Mr. Rajotte, to the time after you had made your contract and you were now working with Mr. Cole to carry out your plans for constructing this road bed.

A. Well, we loaded the plant and shipped it in there to Idaville. Arranged for to get to Station 154; Mr. Cole ordered the plant to Station 17.

Q. You don't understand my question. I want you to tell the court the reason, if any, given by Mr. Cole to you for getting your steam shovel plant up into this upper work. I refer to this particular time.

A. The reason was to beat the rainy season. We had to beat the rainy season to get the work ahead done, to go on up in there; that is the main thing. In order to hold the work down to cost, we had to get in there right away.

Q. Did you and Mr. Cole discuss the probable increased cost that would be encountered if you didn't go up there?

A. Yes, we did; knew that it would be—well, was unestimatable at the time, what it would cost in there in the winter.

Q. At this time was there any bridge across the Kilches River?

A. No, no bridge.

Q. How were you going to get across there?

A. The stream there is very little in the summer time. You can cross it any place with a little bit of blocking.

Q. The plan was to get across before the water came up?

A. The first plan was to cross there before the water—

Q. Mr. Rajotte, were you familiar with the changes, if any, Mr. Cole made in the plans after you and he had the conversation and agreed upon the way you were going to do this work?

A. Yes.

Mr. Freed: Conversation before or after?

Mr. Dobson: All this is after.

Q. Did you get the question, Mr. Rajotte?

COURT: After you entered into the contract?

A. Yes.

Q. And about when was it?

A. In August.

Q. And how long had you been upon the work?

A. I am not positive, maybe the latter end of July or August.

Q. Did you and Mr. Cole at this time discuss some change in the plans?

A. No, he changed the plans and I had no chance to discuss it with him.

Q. You had no conversation?

A. No.

Q. You had no discussion?

A. No.

Q. You just learned that he had instructed that the plans be changed; is that it?

A. When my party went in there to put the plant in this place, with the superintendent, I went away that week and came up in about ten or fifteen days, and I see the lineup was changed.

Q. You had no talks with Mr. Cole about it before that?

A. No, I had no talks. I left.

Q. Just what did you see there? When you came back at this time?

A. When I came back the machine was half way over from the side track to Station 17, moving back.

Q. Just refer to the profile, Mr. Rajotte, to get this thing straight.

A. The side track and the Southern Pacific lays alongside this line. The line is about half a mile away from it right here. The machine was going back this way, to this point.

Q. Just indicate what station?

A. Station 17. That is west of the Southern Pacific. Here is the Southern Pacific crossing right there. That is the logging line crosses this way. The side track at Idaville is here. Where we intended the machine was here, 154.

Q. What would be the distance to this point?

A. That is about a mile and a quarter, seventy-five hundred feet.

Q. So when you appeared there, Mr. Rajotte, at this time, to your surprise you found the steam shovel coming down this way?

A. Coming down this way. They had the complete outfit going there, complete shovel outfit moving to this point.

Q. Did you discuss the situation with Mr. Cole at the time?

A. Yes, as soon as I got off the train I met him.

Q. What did you say to Mr. Cole about this?

A. I said: "How come you changed these plans here going back?"

Q. What did he say?

A. I told him, "I don't see where the work was heavy enough back there." He had changed the ideas as to going ahead on the plan. He said he had changed his ideas on the other end.

Q. Did you remind Mr. Cole at this time as to the delays that you were going to encounter?

A. I told him.

Q. Getting in this work above?

A. Yes.

Q. And what it would mean as to carrying out your contract on the whole work?

A. I did.

Q. Did he make any response to that information?

A. He said that this machine would go back in there and if we wanted another machine and seen fit, we would put it ahead.

Q. Mr. Rajotte, what expense was incurred,—

about what expense would be involved in moving this steam shovel back to that point in the manner which was being done at this time, approximately?

A. Well, moved back there—you mean moved back and get up the trestle and get lined up for what we had to do, or just the bare moving?

Q. Moving back to this point and moving out again.

A. Getting it out again?

Q. Yes, you have to move it again. You couldn't leave it there.

A. Just how far you move it—back to this point, or where?

COURT: You said the machine was being moved back to 17, from some point to 17?

A. Yes.

Q. Be just a matter of moving from there to where being diverted on its regular route you say?

A. We had our line up to go ahead. That would cost us a couple of thousand dollars.

Q. That is approximately.

A. One way.

Q. What I want to get at, did you discuss that phase of it with Mr. Cole at that time?

A. Yes, in this way. There wasn't yardage enough there to move the machine back for.

Q. Was there any other work being carried on there in this vicinity that you hadn't heard of before, or hadn't contemplated when you entered into this contract?

A. Yes, Cole advised me that he had heavier

work back there than he contemplated. That is the reason that he took it back.

Q. Was there any particular character of work that he had down there that was not shown on the profile that you had not considered?

A. Yes. From the profile on the start was pick and shovel and team work, side borrow, and no overhaul. When the shovel came down there to finish it there was eighty thousand yards overhaul.

Q. Was that amount of overhaul shown on the profile?

A. None on the profile.

Q. No overhaul shown at all on the profile?

A. None on that piece of the profile.

Q. Was there any other work?

A. Yes, they had to do some grading for a combination machine shop and round-house and warehouse.

Q. Was that work indicated on this profile?

A. Not on this profile.

Q. Was it indicated on any profile?

A. On none I saw on the job at the time I took it.

Q. When did you first learn they were building this warehouse site?

A. When Mr. Cole sent the machine out to do it.

Q. You refer to the occasion you came back there and saw these things, you say?

A. When I came back, yes.

Q. What additional work besides the mere moving of the material for this warehouse site was

involved in that change?

A. We had to run extra material across the track, across the Southern Pacific. They raised their grades there some; across the warehouse site and some connections in there, and we put a small yard in there, small track there, and a few switches, hooked up.

Q. Was there any other work aside from moving the material for this warehouse site, to be done in connection with the building? Just State all you had to do, Mr. Rajotte, as you saw it there, to make this warehouse?

A. Well, we had to move back to Station 17, open up a borrow pit there, and run the material across. We had to take material close to two thousand feet, across the track, across the Southern Pacific track.

Q. To make that fill?

A. To make that road bed in there.

Q. Was there any preliminary work to be done getting the ground in shape over there?

A. Cross the track for a distance of a thousand feet; they ordered a sidetrack there. The grading—

Q. I am referring to something that didn't show on the profile, that you were not informed about. The profile shows the track.

A. No, this profile shows one track here. We graded out and cleared for an additional track in this thousand feet. It may not be a thousand feet long, it may be some shorter. It was a long track. Cleared and put the grade in shape.

Q. That necessitated clearing?

A. Clearing, grubbing and grading, and putting in shape. That wasn't on this profile.

Q. Did Mr. Cole inform you that was to be done, in any conversation you had prior to entering into the contract?

A. No, I had no information.

Q. Had you ever been shown a profile by any one?

A. Never; no profile of it.

Q. Now, Mr. Rajotte, after you had made this visit referred to here, were you upon this work at some time subsequent to that, when you noticed other changes which were being made, which were different and contrary to your original plans and understanding with Mr. Cole in which the work was to be carried on?

A. Yes.

Do you recall one of these occasions now?

A. Along in October.

Q. What was that?

A. Mr. Norris relieved Mr. Cobb.

Q. Who was Mr. Norris?

A. Mr. Norris then was chief engineer.

Q. Now, just tell the court what happened at that time, and what conversation you had, if any, with Mr. Norris?

A. Well, there was a letter come from the Whitney people at Portland saying that Mr. Cole's orders would go until such times as they conflicted; then Mr. Norris' orders would go. And at that time the

shovel was working up towards Kilchis River.

Q. Was that beyond Station 154?

A. That is beyond Station 154.

Q. And how far away was it, approximately?

A. A couple of miles.

Q. Now, you say you had some conversation with Mr. Norris soon after his being appointed there, after he relieved Mr. Cole, in connection with some change to be made in the plant and work up there. Just tell the court what that was, and where the conversation took place.

A. You mean with Mr. Norris?

A. Yes.

A. Mr. Norris—first, I had gone over the work a couple of times with him, and Mr. Norris wanted to send the plant back.

Q. Just tell the court what you mean by the plant?

A. Wanted to send the shovel back and open up a new pit opposite station—opposite Station 17 where we had the old pit and take more materials from there, and put it back on the fill, from the Southern Pacific crossing east.

Q. Referring to the station there, about what station was that?

A. Station 100 east—oh 120.

Q. 120 east?

A. 100 to 120, also put the material, more material from stations 1 to 15. Fifteen was the end of the borrow pit. The profile reads both ways here.

Q. The division line is the Southern Pacific

track, to make that clear, two divisions, one east and one west. Now, Mr. Norris wanted to move the steam shovel back to Station 17?

A. Yes.

Q. Where this old borrow pit had been opened up originally. That involved moving it about how far?

A. About a two mile move.

Q. How much time would that require?

A. Oh, again we got the track in there and everything, I guess we lost four or five days.

Q. Now, Mr. Rajotte, I want you to state to the court just the conversation you had with Mr. Norris about that move and the advisability of making that improvement or change at this time.

A. I told Mr. Norris that the shovel must go ahead on up the line if there was going to be any showing made, and he said regardless of the cost the lower end of the line that had been planned out by Cole had to be finished, and that the shovel must go back. And I had the superintendent, Mr. Calvin, and we talked with him that it would be better to take some material from where we were digging at the time, and put it back there, as that track was in good enough shape so as to take the materials ahead as we wanted them, and that is the only use we had for it. But he wanted to finish the work that Cole had laid out, as he told us, and then when we got across we would go.

Q. Mr. Rajotte, when you say he wanted to finish the work Mr. Cole had laid out—hadn't you fin-

ished that work, as you were instructed to finish it?

A. Yes, I had finished it according to this profile, and done extra.

Q. Well, did Mr. Cole supervise the work, or didn't he?

A. He did.

Q. Did he set the finishing stakes?

A. Stakes and everything. The track was done on it. We went back on standard gauge track to the second pit.

Q. In this conversation did you have any discussion with Mr. Norris as to the cost of this operation he was asking you to do at this time?

A. Yes.

Q. What was that?

A. I told him in my opinion there would be an extra cost right there in that couple of miles of fifteen thousand dollars.

Q. Was there any other discussion as to the feasibility of doing it at this time or some other time?

A. I tried to leave the track the way it is down there, and to take the machine ahead, but he would not let me off that piece to Kilchis River until he finished it the way he wanted it. He wanted everything cleaned up behind.

Q. Now, Mr. Rajotte, had Mr. Norris changed the grade there?

A. Yes, the grade had been changed there.

Q. About how much change did he make?

A. Well, he brought the line up at that time with the material we were dumping. We were dumping in

water to start with, as they didn't have proper drainage there. They didn't put the drainage in until after we got the railroad built, at that particular point, and we had to raise in water, so we probably went up two and a half feet or better above the grade line.

Q. Was anything said at this time, Mr. Rajotte, by Mr. Norris as to the necessity for doing that work, making this change, rather, at this particular time?

A. Well, I couldn't see any necessity for doing it, only Mr. Norris wished to clean up Cole's part, the work that had been opened up. It was detrimental to the work.

Q. Did you tell Mr. Norris?

A. I told him.

Q. It wasn't necessary to do it that time?

A. I told him it wasn't necessary, the superintendent with me, we all told him it wasn't necessary. I also had Mr. Hawkins get after me about it. He asked me why I done it. I told him I had to do it, as the Chief Engineer told me. He told me I should have wired him, and never mind that. But I was under orders of the Engineer.

Q. Did you make any effort to get in touch with Mr. Hawkins at this time?

A. No. They changed engineers, and was wrangling enough then, and then for me to go to the President, we couldn't have harmony there that way.

Q. Where was Mr. Hawkins at that time?

A. He was east, Detroit, I believe.

Q. Mr. Rajotte, was this all the conversation you had with Mr. Norris at this time?

A. I told him if he didn't get the plant ahead, the job was going to fail. That is, getting it done to that point. Mr. Cole had shot the thing back by moving back there, and he was doing more of the same stuff.

Q. In other words, this would involve further delay?

A. Still more delay.

Q. About how much delay did that involve, Mr. Rajotte, as a matter of fact, if you know?

A. Six weeks time. But that meant four months time ahead.

Q. Just explain why four months time ahead.

A. Was in fairly good weather, and we could have done better work ahead.

Q. You could have moved along faster?

A. Sure. January and February up there it rained awful heavy.

Q. Mr. Rajotte, was there any other changes that you know were made in the manner of carrying on this work, or in the preparing of the road bed?

A. The next change of the road bed, the line was moved here and there, particularly from Station 250 to Clear Creek.

Q. Just mention the stations?

A. 250 to 330.

Q. 250 to 330?

A. Yes, sir.

Q. And what changes were made there?

A. They reduced the curvature there; that is, they built a better line, straighter line.

Q. Did you have any talks with Mr. Norris about these changes?

A. Yes, I told him that it upset the work on us, it made all load and haul.

Q. Did you call his attention to the fact that it was a change in the character of the work from what you figured on?

A. I told him that the understanding with Cole, he was to let us go with the machine, and was to be a cast through there.

Mr. Freed: Mr. Dobson, is it alleged in your complaint, the change Mr. Rajotte speaks of?

Mr. Dobson: They are all alleged. I didn't limit myself to specific instances.

Mr. Freed: I would like to have you point it out.

Mr. Dobson: If that question is to be raised we just as well settle it now as any time. I didn't intend, and I don't think our complaint could be so construed as to limit myself to any specific instance of these changes. In other words, the complaint is drawn on the theory there were numerous changes made, and I undertook to set out some of them. There might be others come up at this time, and I think it would be admissible under the general broad allegations of the complaint.

COURT: Let the evidence in subject to objection. We will determine the materiality later.

Mr. Dobson: I think, at the close of the trial it will be easy to see this evidence is all material.

Mr. Freed: Save an exception.

COURT: Subject to objection and the determina-

tion of its materiality later.

Q. Where were you when you had this conversation with Mr. Norris? Was that on the work?

A. On this piece of ground right here, Station 280.

Q. What response did Mr. Norris make?

A. I can't say I was exactly on Station 280, but was within a few hundred feet of there, because was no stakes only every thousand feet or better when I was on the line, when I was there with Cole.

Q. What response, if any, did Mr. Norris make to you when you informed him of the fact that this work had been changed from a casting proposition to a hauling proposition?

A. Why, he said were going to straighten the line up, straighten Cole's line up. That is the way he said.

Q. What did he mean? What did you understand by that?

A. Well, now, the time Mr. Norris came there, he made a better line of everything. He made more of a main line of it, changed the curvature and the grade and bridges, etc.

Q. Now, Mr. Rajotte, the change that Mr. Norris was making generally there, did that add materially to the cost of building this line?

A. Yes, very much.

Q. In a general way, how much would you say?

A. You mean in the line as a whole, or in this one particular portion?

Q. No, taking into consideration the difficulty

that you would encounter because of these changes?

A. It would be over double the cost.

Q. Were there any other changes?

A. Up as far as we went, it was practically all change.

Q. What is the character of the work from this point you just referred to as Station 380 from there on up? What is the character of the ground up there?

A. It lays at different slope angles on up, with the exception of two large draws on there. That is Clear Creek and Sam Down's Creek.

Q. Mr. Rajotte, were there any bridges to be built up on that part of the work?

A. One at Kilchis River.

Q. Was that part of your work?

A. No, Shay Parker had that work.

Q. Did you ever have any discussion with Mr. Norris with respect to building these bridges?

A. Yes.

Q. What was that?

A. With Cole first, then with Norris, yes.

Q. I presume Mr. Norris was on the work at this time?

A. Yes, he was on the work.

Q. What was the gist of this conversation? What was the occasion of it? What occasioned the conversation?

A. The bridges were to be built and get out of the way for the machine to get across, built ahead of the grade. Bridges put in ahead of the grading.

Q. Were these bridges built on time? Were you delayed because the bridges were not built?

A. Yes, we were delayed on account of the bridges.

Q. Did you discuss that with Mr. Norris?

A. Yes.

Q. What did he say with reference to that?

A. Well, he done the best he could do for the chance he had, I guess.

Q. Mr. Rajotte, did you ever have any conversation with Mr. Hawkins concerning any of these matters which you discussed here with Mr. Norris?

A. Yes, we took them up once in awhile.

Q. Do you remember the first conversation you ever had with Mr. Hawkins?

A. On the works?

Q. On the works or anywhere else?

A. Well, had different conversations with Mr. Hawkins regarding the work. He always wanted the work—he told me at times, as we went up the line at different times, to get on more men and get it done.

Q. Do you remember any particular time when he was on the work with you, and you and he were discussing the method of carrying on the work?

A. Well, we discussed that every time. That was our business there at that time.

Q. Well, Mr. Rajotte, referring to this instance, is there any one instance that you have in mind now that something occurred which would throw some light on the difficulties here, have a bearing on the

way you were doing your work?

A. Why, Mr. Hawkins seemed to be—when we was going up over the line he would say to get it done, and when he came out and seen the manner it was handled, and on our way back would say going all right.

Q. Did he ever complain you didn't have sufficient work or was delaying the work?

A. Yes, he complained to me at one time; said we ought to have a larger force on up there. I told him we couldn't work the men to advantage on the work. It was impossible.

Q. Just state all that was said in that respect, what you did.

A. I told him if the management wasn't satisfactory to take the job, take it over.

Q. Do you remember about what time that was?

A. It was about my third trip up the line.

Q. How far had you advanced with the work at this time?

A. We were up about Clear Creek.

Q. That is about how far, how many miles?

A. Four or five miles.

Q. After you had discussed this matter of additional men with Mr. Hawkins, and he suggested putting them on there, was he satisfied with your explanation of the matter?

A. Yes, when he came back he said: "Frank, you are doing all right" because my experience told me at that time that any more hand labor up in there was just a waste of time and money. You couldn't

do nothing.

Q. Was that what Mr. Hawkins suggested, putting on more hand labor?

A. Putting on more force and get her ahead.

Q. Was that the only instance in which you had a conversation of that nature?

A. Oh, well, once in every six weeks—or two months, he would say: “Keep her going. Get her going. Get her done as quick as you can. Do the best you can.” He was always very good that way, and he always said to me: “Go ahead with it, Frank. Everything will be all right. You will come out all right, don’t forget that. Everything will be all right.”

Q. Did you explain, from time to time, the various difficulties you were encountering?

A. Yes, he knew that.

Q. Was there any discussion as to whether or not that would affect your compensation in any way?

A. No, not much, because I didn’t question that. I always thought at all times that as far as the compensation, that Mr. Hawkins would give us a good fair settlement.

Q. That isn’t the point, Mr. Rajotte. Did Mr. Hawkins tell you he would do that?

A. As to whether the line cost more or less?

Q. Yes, the fact it was costing more, was there any discussion?

A. No, was no discussion about percentage.

Q. Well, did he say anything to indicate?

A. Why, he noticed that the runover on the line

as to money cost more, and like of that, but that didn't bother him as regards me. He told me he would take care of me on that.

Q. Mr. Rajotte, about how many miles of this road was completed?

A. About nine miles. Nine. Might have been a little better with the Y in it at the lower end; I don't know.

Q. Now, at the conclusion of this work, did you know why you were taken off the work?

A. Why, Mr. Norris told me they were going to start logging in there, and they would do the rest of the work themselves.

Q. Who told you this?

A. Mr. Norris.

Q. When did he tell you that?

A. About a month before we got the order to pull in. He told me he wouldn't be surprised they would start in at any time, and they moved some of their camp equipment up in with our camp up there.

Q. That is, their camp equipment?

A. Yes, this logger construction camp. They were going to start logging operations.

Q. I show you a letter, Mr. Rajotte. Is this the letter you referred to, in which you were advised to discontinue the work up there?

A. This is the letter.

Letter offered in evidence, received without objection, and marked

"PLAINTIFF'S EXHIBIT 2."

Q. Now, Mr. Rajotte, referring to this letter, which is Plaintiff's Exhibit 2, which is dated September 25, 1920, I understood you to say that you had some talk with Mr. Norris about a month prior to that time, with respect to your discontinuing?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. And the substance of that conversation was that they were going to proceed with the logging operations, and they would finish the work themselves.

A. As they went. They were going to take over all operations connected with their company.

Q. Now, Mr. Rajotte, did you have any conversation with Mr. Norris, or with any one connected with the company, between that time and the date of this letter, September 25, Plaintiff's Exhibit 2?

A. No.

Q. Concerning this matter?

A. No.

Q. Was this letter a surprise to you coming at this time, or were you expecting it?

A. No, it wasn't a surprise because I figured from there on to have a contract mixing in amongst logging camps is not good policy, and they know that.

Q. Now, Mr. Rajotte, at the time you had this conversation with Mr. Norris, preceding the receipt of this letter, and also at the time you received this letter, had there been any discussion as to further changes in the lines of this road bed?

A. There had.

Q. Yes.

A. Yes, they was still changing the line.

Q. Had the line been thoroughly fixed or established at that time if you know, or do you know?

A. No, he had part of it established ahead, and had it cleared for right of way.

Q. And about what station were you when this letter was received?

A. The shovel was up at Station 545.

Q. Where was the rest of your force?

A. End of the work for the clearing, I guess, would be—I couldn't say positively, but in the neighborhood of 570, up that way some place. I can't state that to a hundred or three or four hundred feet, but was up in there.

Q. Approximately.

A. I would say something like that 550 to 570.

Q. Now, Mr. Rajotte, after the receipt of this letter, I take it you moved off the work?

A. Pulled the line into Idaville immediately.

Q. Now, did you have any meeting or talks with Mr. Hawkins following that event?

A. Yes.

Q. How soon afterwards?

A. Oh, about thirty, forty, thirty days afterwards.

Q. Where did that take place? Here in the City of Portland, or somewhere else?

A. Lewis Building, Portland.

Q. What was the gist of your conversation? What was the conversation subsequent?

A. It was in regards to settlement.

Q. Well, will you state in substance what that was?

A. Well, we asked him for the balance due.

Recess until 2 P. M.

Portland, Oregon, Wednesday, October 24, 2 P. M.

FRANK RAJOTTE resumes the stand.

Mr. Dobson: At this time that is all, reserving the right to recall Mr. Rajotte.

CROSS EXAMINATION

Questions by Mr. Freed:

Mr. Rajotte, on what basis, or rather, relying on what matters, did you enter into this contract?

A. I didn't get that.

Q. Well, you stated you went over the ground,—I will ask you about that later,—with Mr. Cole. You said that a map and profile was submitted to you, and you had some conversation with Mr. Cole. Now, as I understand it, based on these things, you entered into the contract. What did you rely on?

A. I relied on the profile that Mr. Cole showed me.

Q. Well, did Mr. Cole—Mr. Cole showed you?

A. Mr. Cole.

Q. He gave you a map, he didn't show it to you. He gave it to you.

A. He gave me a map.

Q. That is the map that is in evidence there?

A. The profile in evidence, yes.

Q. Did he give you a map?

A. No map.

Q. Did he give you anything else other than that profile?

A. To the best of my knowledge, there was nothing but the profile.

Q. What did you mean, then, in this contract when you say a map and profile was submitted to you, and in your complaint, when you say a map and profile was submitted to you?

A. That is contract and profile, that contract and profile.

Q. If in your complaint and your testimony you say that a map and profile was submitted to you, what did you mean by a map? What map are you talking about? On page 2 of your Amended Complaint, at Line 5, Paragraph 4, you say that the "above mentioned map and profile of said proposed road bed" or to go back to the first time you mention that you say that "on or about the 25th day of June"—I think that should be the 24th, I think that was corrected?

A. Yes.

Q. (Continuing) "1919, plaintiff and defendant made and entered into an agreement in writing, wherein and whereby for the remuneration therein stated, plaintiff undertook and agreed to furnish all labor and perform the work necessary, or as may be required of it, to construct twelve and a half miles of railroad bed in accordance with a certain map and profile which had prior thereto been submitted to the plaintiff by defendant, from Tillamook Bay", etc. Where is that map?

A. If there is a map, profile and contract, you will find the contract signed by me, and the map initialed by me,—if there is one, but I had never seen any map when I took this contract.

Q. What did you mean?

A. Well, sometimes will call the profile the map, or the map the profile.

Q. But then that wouldn't be map and profile. You might have called it profile, or might have called it map, but you wouldn't call it map and profile, would you? I just want the facts. We contend, and will show you that we submitted that map.

A. Well, here is the way I look at it. If there was a map there, I initialed the map when I signed the contract, and I don't remember initialing any map. If you have it, all right.

Q. Did you initial that profile?

A. I think so.

Q. Well, did you initial the profile with the copy? This is our copy of the profile.

A. You must have the copy.

Q. Well, I mean if I have a copy, then you initialed it?

A. The profile?

Q. Yes.

A. Most likely.

Q. Now, Mr. Rajotte, here is what we are going to contend is the original, a blueprint of which we submitted to you, and that is the blueprint if I am not mistaken.

A. Very well.

Q. Now, would you have this initialed? I just want to get at your statement. You may have it, I don't know. I am not saying it is not.

A. I haven't got it initialed that I remember. All I remember is the old blueprint, but at the time of signing this, in order to put that contract through proper, they made you initial all papers that are presented.

Q. Initial the copy that you get?

A. All copies. To go through the form you have to do it. Now, if I had initialed it, I have signed it, but I never remember of seeing any map.

Q. Well, if we present a map here—

A. With my initials on it, all right.

Q. Suppose it hasn't got your initials on it, and it is testified to that it was submitted to you, would you be prepared to say no map was submitted?

Mr. Dobson: That is objected to. I think the map itself is the best evidence.

Q. I withdraw that question and ask you this: Are you prepared to say no map other than that pro-

file was submitted to you before signing that contract?

A. If you show me a map my memory will tell me by looking at it whether I have seen the map on this job or not.

Q. Please answer my question. Are you prepared to say now that none was submitted to you?

A. I am.

Q. You say that none was submitted to you?

A. To my knowledge now none was submitted.

Q. Now, Mr. Rajotte, you went over six miles of this road with Mr. Cole, you say?

A. Yes.

Q. How long did it take you to cover this six miles?

A. Took us a whole day.

Q. How did you go over it—walking?

A. No, we went up a side road in an automobile, and went across the river in a boat.

Q. Did you walk along the full six miles, along where the road bed would be?

A. No, part of it I seen from the machine, and went into different crossings like the lower end at the Graveyard, at Kilchis, and then came up the river the other way and crossed in a boat. I probably in looking at it walked four miles one way, and four miles back.

Q. I understand you to say you didn't go along the staked out area?

A. I went along the—I can give the stations I went along. I went along from about 260 on up to

about the six miles on the possible center line, where was a stake here and there, and a little bit of blazing done through the timber.

Q. You covered about four miles, then?

A. About four miles.

Q. You walked along about four miles?

A. Yes.

Q. How closely did you examine it?

A. Well, I was examining as to the lay of the hill, that is all. You couldn't make far, very slow going in there then, a part of the upper end of it awfully slow.

Q. How carefully did you examine?

A. I just examined as to the slope of the ground, and the material you could get away with that machine.

Q. Did you make any notes?

A. No, never put down any notes, only as to mileage, what I could do with the plant.

Q. Have you those notes with you here?

A. No.

Q. When is the last time you saw those notes?

A. If I remember—I never paid much attention to them notes.

Q. That is, you didn't pay any attention to those notes when you entered into the contract?

A. No, I had the lay of the ground in my mind when I went into it.

Q. In other words, in your mind and not in notes.

A. Sure. I was figuring plans for the job, the

easiest way to get away with the material, and I decided what I needed to do.

Q. You carried that in your head. How long did it take you to go over it?

A. I carried it in my head from that time?

Q. How long did it take you to go over that?

A. Make maybe two miles an hour in there, something like that. We were at leisure. Had a lunch with me.

Q. Took a whole day?

A. Yes.

Q. Throughout the day you carried everything in your head you needed to figure on this job?

A. Sure, yes.

Q. And that is what you went on?

A. Sure.

Q. And you and Mr. Cole agreed you ought to do it for about \$82,000?

A. Eighty to a hundred thousand.

Q. And Mr. Cole is the man you call incompetent in this complaint and yet you agreed with him. What would you say as to your ability?

A. My ability and Mr. Cole at that time, and the kind of line we were going to put in were correct.

Q. Did you trace the line?

A. The alignment?

Q. Yes, the alignment.

A. We didn't have so much to do; had the quantity of the grade and up and down. You must remember when we went we concluded it was an ordi-

nary, inexpensive logging line we were going to build.

Q. All right. We will come to that. This was staked out for about six miles?

A. Was staked out; had a stake every thousand feet or so, like ordinary logging.

Q. How could you tell how the road would run?

A. Experience tells me that.

Q. But maybe I would want a different line. Your experience couldn't tell where I wanted that road.

A. That is where I got the impression from, your road; from your engineer giving us leeway to make plans to follow the contour, to let the machine go to make headway, and get the work done toward winter.

Q. Did you have this profile when you went over the line?

A. We had a piece of the profile showing the ground.

Q. Did you have this?

A. Not the full profile; no, not the time I went up first.

Q. What were you going by? Going by what Mr. Cole told you?

A. I went by what Cole told me and my own judgment.

Q. Assuming that what Cole told you differed from the profile, what about that? Which would you go by?

A. How is that?

Q. Suppose that as Mr. Cole pointed out to you where this road bed was to be run, stakes a thousand feet a part—

A. Yes.

Q. Did it just point out to you "It runs right along there" or did you take this profile and trace it?

A. He had the profile, just showing the ground line, and as we were in the timber, you can see ahead of you some distance—might not be able to see over 250 feet. You walk over that ground and maybe down a little draw and up again. I looked at the different elevations there. I wanted to get a point to see whether a machine could go through there, to check myself. The creek is alongside me. I tell what kind of a grade there, what possible grade and the slope of the hill and then compare my machine and what to put. I have always decided on plant, that is all I ever do.

Q. When you signed this contract, did this contract describe the road bed you expected to build?

A. It did to a large extent.

Q. Then, if you built the road bed according to this contract, if that was the kind you were called upon to build, you have no complaint against the Whitney Company. Let me explain what I mean. If anything you gathered from your experience and observation was different from what this contract states, you understood the contract governed.

A. Yes, sir. I will explain that just the way you explain to me on that. When you hand me your yardage and figures on that contract—I will just

show you where I figure to bid on this work and set the time for January and I signed that contract, yes. You give me a logging line to build—understand here is where I get my information, if the plant is put up, regardless of anything from my own experience. You had 166,000 yards overhaul, which meant to do the job—you had a job entirely cast.

Q. You had that?

A. By the form you ask requests on.

Q. Where did you get these figures?

A. I got those figures from the request for bids, that is, the form, and in that contract read only a few yards; when we finished the job it was 680,000 yards—I wouldn't go to work and take eighteen four-yard cars to go in and do 680,000 feet of overhaul, 300% more, and tell you I could do that job in the winter. That would be wrong; you couldn't do it.

Q. Was the road bed built of the dimension called for in this contract? You don't answer the question. That is what I want.

A. It differed on that. It differed from that.

Q. What did you understand was meant by this statement. "The engineer assumes through this warning that the contractors have examined the ground over which the railroad is to be built and knew at the time he entered into this contract the amount of work to be done, the difficulties to be encountered, the hardness of the materials to be moved, handled and put in place, together with all other work to be done, and the quantities thereof, to bring the railroad to a fill and satisfactory completion by the

time herein set forth for its completion. The contractors accept this work solely and unreservedly upon their own information and without reference to any preliminary estimates of quantities, profiles or other papers handed to bidders before the contract for doing this work is let and the chief engineer reserves the right to alter and change the alignment, grades, forms and methods of construction as shown on the maps and profiles, and he may increase or decrease any and all approximate quantities as shown on the preliminary estimate and the contractors hereby waive all claim to any anticipated profits or damages owing to any such changes."

Did you mean what this contract said, did you understand that, did you mean to take your preliminary estimate and anything Mr. Cole said?

A. I made no preliminary estimate in quantity. Mr. Cole told me that and they were in that contract when I arranged to do the cost plus job.

Q. What did you understand this provision to mean?

A. I understand the provision to mean that I was a contractor, that Cole figured that he had a contractor that knew his business and that could check himself in looking at a piece of work. Now as to what I assume when you show me quantities and put that clause in there, you show me a different railroad than the one you built.

Q. How did it show a different railroad? Was the alignment changed?

A. Your alignment is changed.

Q. How much?

A. So much as to do away with the car and track haul and loading.

Q. Where was the alignment changed; what stations?

A. Well, the alignment was changed—

Q. Do you want to look at that profile?

A. Sure.

Q. Tell the Court just how much the alignment was changed?

A. Well, the alignment was changed above the Kilchis River, that is, the old Cole survey that I looked at was changed. This curvature in here from 12 to 16, or about down to about 10.

Q. What was moved?

A. The curve, yes.

Q. What did that have to do with the difficulty?

A. Well, you see, three feet from the bank, two feet from the bank, on the high side; that is 90% of the material; we can't cast.

Q. Could you carry in your head—do you mean to tell the Court you would carry in your head the alignment of that railroad for six miles? You didn't have this profile? You did get that?

A. We didn't have the profile but the alignment at that time had to go by a cast, and Cole understood would make it cast and cut down his overhaul in order to make the time.

Q. Who said it had to go on a cast job?

A. Cole, in order to get the time. We both agreed on it.

Q. Then you took what Cole told you then?

A. No, I took my own head with Cole's, that is right.

Q. How is it now, you come in here and want it different?

A. He didn't build the same line. He gave me 680,000 yards of overhaul against 166,000 on the profile. That meant loading a thousand cars and dumping fifty or sixty thousand loads of extra material. Your overrun in material is then sixty-two or three thousand yards.

Q. You understood, didn't you, any quantities appearing in the contract was just sort of an estimate?

A. Why, I had a price of three cents for overhaul, and a price for each unit of material. Still, I wouldn't want the Court to think I would go up there and sign up to deliver in a lot of cars and make thorough cuts at different places in that length of time. It couldn't be done. Had you built the line at the place and time we figured on all hunkydory.

Q. Who figured it?

A. The way the land lay and our alignment shows.

Q. That is before the contract was signed?

A. Sure; and this profile changed. That is, you built a different line than this profile.

Q. How much changed?

A. It is enough and took the management away from me, the engineers did. I had to go their way when they flashed the contract on me. I had to do

what they told me. That is stated in the contract.

Q. You understood when you signed the contract?

A. Sure; they took away the management from me.

Q. If the stakes were a thousand feet apart, how did you know where the old survey was? In other words, how did you know where Mr. Cole had the thing staked out, if the stakes were a thousand feet apart?

A. You mean the stakes intermittently between the thousand feet?

Q. You told me the stakes—

A. About a thousand feet, I would say. Might be more, might be less.

Q. How could you tell just where that alignment was to run?

A. Because the alignment was going to be put at the best grade you could put the machine through there, and you can't change it much.

Q. I am asking could you stand at thousand yard stakes—

A. See? You couldn't see in the timber at all—two hundred feet.

Q. You couldn't see where the alignment bank was to run that? Isn't that a fact?

A. Sure I could see. The river is down below me, the railroad should keep within a hundred feet—eighty—a hundred and sixty—eighty. Should keep some place in there, because there you can get level

grades. You ain't going to get a lot of extra money for nothing.

Q. I am asking if you could stand at each thousand yard stake and see the next thousand yard stake?

A. No; not in the timber, no.

Q. Then you couldn't do it. That is necessary, isn't it?

A. No, but could walk over and know what it was.

Q. Did you walk over?

A. Sure I walked over; I walked the center line.

Q. How many miles?

A. Four miles in there, pretty hard.

Q. You didn't walk over the other two miles?

A. The other mile was easy walking; that is where no clearing opened. You didn't have to walk centers.

Q. You took your own general estimate without putting down any figures?

A. Oh, sure, as to getting the work done.

Q. And you decided from that you could do this work by January 1st, 1920.

A. As regards figures now, the quantity figures were given me by the engineers, that I went on. You say my figures. I didn't make any figures. I figured time for getting the work done.

Q. What do you understand by this proposition that these preliminary figures don't govern?

A. That is all right, but we were signing up to do the railroad in a certain time; I had to look at quantities.

Q. Then you disregarded this provision of the contract? You didn't understand that that had any effect at all?

A. No, I didn't disregard that at all.

Q. You depended on the preliminary figures then, didn't you?

A. Why, sure, that is the preliminary for guides, your guides. Had you given me the finished quantity you wouldn't have had me on the work at all, or would have had me in there with two steam shovels.

Q. Do you know whether it is a fact, or is not a fact that these figures appearing in this contract, the amount of excavation and the amount of cut—the amount of cut and the amount of fill—are much less than the totals shown on that profile map? Do you know that was a fact or that it wasn't a fact?

A. Why, as a rule the work generally overbreaks some.

Q. No, you don't understand what I mean. On this profile map, it is shown at each place how much excavation there is to be and how much fill, that is shown there.

A. That is overhaul; I think the overhaul is on that map.

Q. Do you know this to be a fact, or is it not a fact, that if you add up the total excavation shown on that profile for the nine miles that your company did, that that will add up considerably more than the excavation called for in this contract as just a preliminary estimate?

A. I don't think it will differ very much.

Q. Suppose I prove to you that it does exceed it by a very great quantity, which did you go by, the profile or the quantity in here?

A. The quantity—when I signed this contract, you want to know which figures I used?

Q. Yes.

A. Well, I would say I would take the contract figures; on the contract.

Q. That is what is known as the preliminary estimate in here?

A. Yes, a few thousand yards, twenty thousand yards of material, don't make much difference.

Q. Suppose that the defendant shows you that you could have finished the road bed that was finished by excavating not one yard, cubic yard, more material than is called for on that profile, would you still say—that "Excavation" applies to fill and to overhaul and to all matters—Would you still say you have a claim against the Whitney Company?

A. Give me that question again.

Q. Suppose when we add up the figures on that profile which you had before you signed the contract, and it proves that you could have finished the same road bed that you actually built by excavating no more material than is called for to be excavated in that profile, that you made no greater fill or didn't have to make a greater fill than is called for in that profile, and the overhaul the same way, would you still say that you have a claim against the Whitney Company?

A. I used the Chief Engineer's method; I have to use their method.

Q. I don't want to get you confused, because I want an answer to the question, but I will state this: We expect to show by a witness that adding up the quantities of excavation and fill and overhaul as shown on that map—if it shows overhaul; I am not certain about that—is no less—the quantities shown which you should have known about are no less than the quantities which you could have dug out and put in in building this road bed. That is what I expect to show, that you could have built this road bed. What would you say about that?

A. If you can show me actual yardage, but I won't take any profile measurements, but I want actual material and balanced quantity, and your shrinkage and swell of material, etc., but not your profile.

Q. In other words, you don't care what that profile showed?

A. Yes, I do; yes, I do. Take an instance on the profile where we started out this morning.

Q. We will take the instance.

A. For instance, the first quarter mile, you over-run one thousand yards overhaul.

Q. How do you know that?

A. The profile has no overhaul on it; that is what I bank by.

Q. The profile doesn't show overhaul at all?

A. It shows ahead overhaul but don't show it back there.

Q. How about excavation?

A. Excavation?

Q. Have you added up the excavations shown on that first quarter of a mile of profile?

A. Yes.

Q. What does it add?

A. Shows it in three places.

Q. You did add up the profile? You used that profile in making the figures, didn't you—then I will leave this.

A. No, I didn't use your profile,

Q. You didn't use the profile?

A. No.

Q. Didn't pay much attention?

A. In other words, when you figure equipment to go in a job, winter job in this Coast climate, you figure car and equipment.

Q. When you signed the contract, Mr. Rajotte, you had walked over only about four miles of this railroad?

A. No, I had walked up to Sam Down's creek, and seen everything from the Bay to there.

Q. You had walked over before you signed the contract?

A. Oh, at intervals, practically all the line, maybe, but that is not so much in the center, you know, and light work. I didn't pay much attention to that.

Q. When did you do this?

A. 1918, 1919.

Q. You said this morning when you were up

there with Mr. Cole, you walked only over four miles of it; did you make another trip up there?

A. I went to the crossing and went up the river about a mile or so; crossed over the river; went up in that place, this piece I am telling you about, and then came down and took a look to where she broke over into the flat at Kilchis, then back to the crossing where we were, and walked through a ways, and come back and drove to another hole at the graveyard, looked both ways there and then to Idaville and looked there.

Q. That is the only trip you made?

A. Two trips.

Q. When was the second one?

A. In the spring of 1919.

Q. Were you with Mr. Cole, both times?

A. Yes.

Q. The trip you spoke of this morning when you walked over four miles of it, was that the first or the second trip?

A. I think it was the first trip.

Q. You made a subsequent trip. Now, you expected them to build a road bed along a line of which you had a mental picture from the survey which you just recounted to the court. Is that right?

A. I expected, yes.

Q. Sir?

A. Build a line along—how is that?

Q. When you signed this contract, you signed a contract—you thought you were signing a contract

to build a road bed on a line of which you had merely a mental picture?

A. And had walked the bigger part of the ground.

Q. From the survey which you just recounted to the Court?

A. Sure.

Q. Now, Mr. Rajotte, when did you have a conversation with Mr. Hawkins? What date was that, approximately?

A. As to what?

Q. As to his statement that he would keep you whole, or something—I forget the expression?

A. Different times on the work. He said: "Go ahead, Frank. Everything will be all right"—that is the expression he used.

Q. Was that said in response to a statement from you, or did he just come out and say: "Go ahead, Frank. That will be all right"?

A. Well, he would say—no, he didn't come out and speak that way. Asked about how they were getting along.

Q. He did ask?

A. Yes, and couldn't we get on more force, and what our idea was up there, and maybe done a little kicking about the job, but when I came back down the line with him, he says, "I guess it is all right." I done my own crying—told him there was a lot of different changes in there, and I didn't see where there was going to be any profit in it for us, if it kept

up. He said: "Get it finished, Frank. You will be taken care of."

Q. Well, did you ever tell him you wouldn't continue that contract—you wouldn't continue your work unless a different arrangement as to payment was made?

A. No. I didn't tell him that.

Q. You never made any complaint, then, along that line?

A. The way I made complaint was had been so many changes and everything that unless he was going to see that we were going to come out all right, it would be useless for us to be there, as the chief engineer in both instances—we had to go by thier guidance, and we were not allowed to use our own way enough to carry it out.

Q. You understood the contract said the chief engineer was to be in charge?

A. Sure, I did.

Q. You knew that when you entered into the contract?

A. I did. I had let go the reins to him, and had to do as he told me.

Q. You don't contend, do you, or want the Court to understand, that Mr. Norris here, our engineer, for instance, or Mr. Cole, who was engineer at first, out of some whim, or out of cussedness, for instance, made these changes, or did it because we wanted you to lose money?

A. No.

Q. Then you don't claim anything like that?

A. Oh, nothing like that, no.

Q. You admit, don't you, that they made these changes because they thought it would give them a better road?

A. Sure, for the betterment of the line.

Q. Now, do you remember of ever telling Mr. Norris, and maybe Mr. Hawkins—I am not sure of that—that they were getting this work done as cheaply as any work on the coast, and if they didn't believe it, they should investigate, something of that import, maybe not those exact words?

A. I did, yes.

Q. Then they were getting that work done—in other words, the work was being done for them just about as cheaply as could be?

A. I think without experience we were operating cheaper than lines that were being built near the work.

Q. In other words, then, when they had you do more work, assuming that was the case, had you overhaul 50,000 yards, for instance, more than you thought you were going to have to, that 50,000 yards was overhauled for about as little cost as anybody could do it, wasn't it? That is what you meant to tell them, wasn't it?

A. We handled the material, whether it was overhaul or any other kind, about as cheap as any contractor, or a little cheaper.

Q. So any of these increases, if there were increases, and you seem to think there were at the present time, merely meant that instead of being \$50

worth of work there was \$100 worth of work. I mean that is the proposition, isn't it?

A. No, the increase in the overhaul and the alignment in there, taking that away from it and bettering your line, took our cast work away. In the first place where you spoiled that is where you took the machine at the lower end and put it in there, and put us out to the winter time, when labor in this kind of work is useless.

Q. I am glad you brought that out about moving the shovel. Did you mean to tell the Court this morning that you moved that shovel from Station 154 to Station 17?

A. No, moved from above that.

Q. From where?

A. From further up the line than that.

Q. I am speaking about the first move, the first time you ever hauled it back.

A. The first move was from the sidetrack at Idaville, over across the highway to Station 17.

Q. You said this morning, in exhibiting that map to the Court that you moved your shovel back?

A. Yes.

Q. How many times, in the course of this work here, did you move your shovel back?

A. In the first three miles we went back twice.

Q. Tell me the first time you went back, from what station you went, to what station you went?

A. We were on another track at Idaville, Southern Pacific railroad track. Here is the Southern Pacific railroad track, the logging line goes across

it this way. The depot is down about here, on a side-track. We moved it across this way.

Q. That was when you unloaded, was it?

A. Unloaded with the intention of going east.

Q. When you unloaded it, though—at the time you unloaded it, you knew you were going to 17?

A. No, we did not. We had no intention of going to 17.

Q. How far did you go in the other direction before you turned around?

A. We went to 17.

Q. That is what I say. I don't know what the intention was beforehand, but when you unloaded you knew you were going to 17?

A. No, we didn't know we were going to 17. Mr. Cole changed the orders. We were going to 154.

Q. How far had you gone to 154?

A. Hadn't gone any.

Q. That is what I say. The first move you made was in the direction of 17?

A. Correct.

Q. You didn't move up. I am afraid you gave the Court that impression. You didn't move towards 154 at that time and bring it back to 17, did you?

A. No.

Q. I understood you this morning—I don't say you said, or intended to, but my impression was that was what you meant. All right. You got to Station 17 with your shovel.

A. About that, yes.

Q. Now, what did you do. When did you make your—where did you move your shovel from there?

A. We stopped there and made a borrow pit.

Q. Where did you move to?

A. To 75 or 100 feet—the material. The shovel went to 17.

Q. You progressed, or started on up to 154?

A. We stayed in the borrow pit there and took material out to the Southern Pacific track and across the track.

Q. To Station what?

A. The tail of the haul was about where the highway crosses it.

Q. Just in a general way?

A. Well, the highway crossing, along the highway crossing.

Q. Is that about 125?

A. Yes, that is it, 125. No, 130, along in there. Now, wait a minute, we may not have hauled up that far, but we got in to 115, say.

Q. All right, I don't care about that.

A. I don't care about that.

Q. You progressed on up there. Then what did you do with the steam shovel?

A. Moved her then to—we took out—we cut there at—a small cut between 145 and 150, I guess—140 and 150 in there.

Q. Then you progressed on up to 154, was it?

A. Kept going, yes, sir.

Q. You didn't move back during this time?

A. No.

Q. How far did you go before you had to move your shovel back?

A. I think we were in the neighborhood of 228, something like that, 225. I am not positive about that.

Q. About what date was it? Can you refer to any record and show that—about what date was it when you started to move your shovel back?

A. I don't know whether—

Q. Approximately. I don't care about the date.

A. About November, I think.

Q. Some time in November, probably?

A. November or October.

Q. Now, you saw Mr. Norris then—he was the engineer at that time?

A. Yes.

Q. He told you to move that shovel back?

A. Correct.

Q. Back to where?

A. Back to 17, on the opposite side of the track.

Q. Back to 17?

A. About 17, in there—16.

Q. Why did you move it to 17? Why did he want you to do that?

A. Open up a new pit, to make more room for the sites at the track, and get more material to raise the fill again from the Southern Pacific crossing back to this 115.

Q. Then I understood you to say you moved it back to 17 this time?

A. Yes.

Q. From about 225 or 230?

A. Yes, something in there.

Q. Back to 17. And you didn't know anything about that until Mr. Norris came to you and told you to do it?

A. No.

Q. Were you on the job? Did he tell you?

A. I absolutely rejected taking that shovel back.

Q. Were you on the job? Did he come to you and say: "Mr. Rajotte—

A. No, he told the superintendent, I think, Glavin. Glavin just had the information, but I came down there.

Q. Had they already moved the shovel back when you got back from wherever you were?

A. No, I don't think they had. I won't say positively no; just this movement.

Q. How often were you down there on the job?

A. Not over three times in a month.

Q. Three times in one month?

A. Not over three times.

Q. What month?

A. Three times some months, two times one month, one time one month.

Q. Don't you keep a diary?

A. No, sir, I don't keep no diary. I have plenty of jobs to look after and keep going.

Q. You are not able to tell us, then, how many times you were down on the job?

A. To that work?

Q. Yes.

A. I should say in the fourteen months was down thirty odd times.

Q. I refer particularly to August, 1919. That was the first month you began?

A. Yes, August, I think I was there in August.

Q. You were not there in August?

A. I was there.

Q. How many times?

A. I think I was down twice. I can give you an instance, if you want to check it how you can tell.

Q. All right.

A. The shovel was about half way to the first pit when I got up there, whatever day that shows on the record of the move, I landed there that day. They made the move by a day or a day and a half, something like that.

Q. You moved that shovel back to 17, you say. How long did you keep it there. I don't want to tax your memory, if you have records.

A. We were a little over a month doing that work, that first time.

Q. And then you progressed ahead?

A. Yes, sir.

Q. Where did you move it to then? That is way up beyond 230, didn't you?

A. No, went on up to the cut this side of the graveyard.

Q. I don't know where that is, what station?

A. About 145. Well, she dug her way up there a ways—140.

Q. And when did you bring it back? You said you brought it back a second time.

A. Brought it back—if I could have the records I could tell—November, the first of December, some place in there.

Q. Do you know about what station you brought it back to?

A. Yes.

Q. What was it?

A. 17 on the opposite side.

Q. No, you brought it once.

A. Well, we brought it the second time back to that place.

Q. Second time?

A. Yes, 16 or 17. You see we had a borrow pit on each side. The first time we had left side borrow, looking towards the bay; the second time on the right hand side. The right hand side was a large borrow pit.

Q. Before you signed the contract, did you examine the ground beyond Sam Down's Creek?

A. There wasn't much examination there, no.

Q. How much was it?

A. Just what you could see through the timber there—that is all.

Q. Just standing and looking through?

A. Sure, that is all.

Q. You didn't examine it, then, did you, except that?

A. Just see the break—I knew the hills ran a little steeper there. I could tell, looking ahead.

Q. Had you ever been there in your life?

A. No, I had neevr been up there.

Q. Still, on that examination you based your estimates in going into the contract?

A. On that examination, and figures they gave me is what you base taking contracts for. That is all you know. That is the way we go over the work, highway work, or anywhere.

Q. Was the line of the road bed located on the ground above Sam Down's Creek?

A. I couldn't say, because I didn't go up in there to look at it.

Q. But what you could see, looking ahead.

A. I didn't see. I will say up there you probably couldn't see 75 feet ahead by looking through the timber.

Q. How did you know where that railroad was to run?

A. Well, you couldn't run it into the hill unless you put in a tunnel, and if you run the other way, would put a bridge in the river; had no other way to go but follow the contour.

Q. You couldn't see but 75 feet.

A. I knew he was going to put in the cheapest line he could put in there, from the information he gave me.

Q. You had a lot of experience contracting, and knew what people were going to do.

A. I didn't know so much. The engineer knew what was going to do.

Q. Did they do it? Was that the way it was actually run?

A. He could have run a cheaper line through that place.

Mr. Freed: I want to explain something here to your Honor. Maybe you have had experience in this, but when you speak of locating road bed, that means staked out on the ground. When a thing is located, you have your map of it.

Q. Now, may I ask this question: Did the Whitney Company's engineer locate that railroad, or that road bed according to the way you thought it was going to run beyond Sam Down's Creek?

A. You want to know on the line they built this line?

Q. I want to know as they actually had you build, whether that alignment was the alignment which you pictured in your mind when you stood up there gazing off into a place you couldn't see 75 feet ahead of you?

A. Cole had been up in there, you understand, and told me what he found, understand, and I looked ahead at it, and we were to go through there the cheapest possible way with the machine. The grade didn't bother us.

Q. In other words, you were going to build through your contract, signed your contract, rather, on a basis that you looked off up there and couldn't see but 75 feet, and that is five miles up there, but you knew because Mr. Cole told you they wanted it done as cheaply as possible, and you know what kind

of a road that was to be by having it done as cheaply as possible?

A. Yes, and had a survey of about ten or twelve thousand yards per mile.

Q. That survey is that profile?

A. Not at that time he didn't have this survey.

Q. In other words, at the time you entered into the contract he did not.

A. He didn't figure on the line you built there at the time we went in there, and he had no intention to put in that line there.

Q. You make that statement, but I want to know how you know that?

A. Because I agreed with him on the figures we could do the work for, about \$100,000, and we know what we can do the work for.

Q. You say in your complaint, and swear to it, and say in this contract you signed that you examined it?

A. I have examined it, giving me information enough to bid on it.

Q. You say that in making your estimate, based on your examination, you allowed for changes which would be made. Now, what examination were you talking about?

A. But not such radical changes as you have, building a different line.

Q. How did you know what kind of a line?

A. Experience tells me, and Cole told me the kind of line they were going to build. When he figured to build a line up there for \$100,000 he never

figured to build the line you built; you built a trans-continental line up there. You didn't build a logging line.

Q. In other words, you entered into this contract on the basis of Cole and experience; that is a fact, isn't it?

A. Yes.

Q. In spite of the clause in the contract. Who is Mr. Glavin?

A. He is a superintendent I have.

Q. He is your superintendent?

A. Yes.

Q. He was in charge of your work?

A. He was in charge with Mr. Fobert on the work.

Q. How often was Mr. Fobert down there?

A. Fobert went down first to start them off, as I left, and started them off and came away. He didn't go back for quite a little time. Mr. Glavin took charge.

Q. How long was Mr. Fobert there the first time?

A. The first time. He looked over, he started the outfit; there about a week.

Q. A week?

A. I imagine about a week.

Q. How long was he away subsequent to the week he was there?

A. Then Mr. Glavin took hold, and I don't think Alec came back for—I don't think Alec came in un-

til spring again there. He might have went down there once or twice to take a look.

Q. He didn't have anything to do with the management?

A. Yes, he did.

Q. Not on the job. You say he was not there.

A. He went down there with the same orders that I had. If there was any place we could trim it, he would give orders to the superintendent what to do.

Q. When was he there?

A. I am not positive. I imagine a few days in the first four or five months; then he went down and stayed there.

Q. In the spring of 1920?

A. Yes, he went there and stayed there.

Q. Who was in charge of this work?

A. Glavin in the meantime was superintendent under my orders.

Q. Glavin was in charge, as far as you were concerned, locally there?

A. Sure.

Q. Who is Mr. Rackcliffe?

A. He is the timekeeper.

Q. He was what?

A. Timekeeper and bookkeeper there for the first month or six weeks or five weeks.

Q. Now, Mr. Rajotte, how did you expect to make your fills if you were going to dump this excavation over and throw it away? Where were you going to get your dirt to make your fills?

A. Well, you show me the fills on here that you want, and I will tell you.

Q. Wherever you dump.

Q. Show me the fills, and I will tell you how I expected to make any one of them.

Q. Where did you do your first dumping? Where did you intend to do your first dumping?

A. Well, the lineup in the first place was to go across Kilchis with the machine. They said put her in for a short time at Station 154.

Q. You don't answer my question. You told the Court that you expected, when you signed this contract, in many places to be able to take the material you excavated, and just throw it away, dump it, in other words, didn't you?

Mr. Dobson: May I make a suggestion? If you will let Mr. Rajotte take a pencil, he will try to diagram.

Q. I know, but you told the court when you entered into this contract, you thought that in many places you were going to be able to dump the excavated material, and you now tell us you had to haul it out. Wasn't that what you said?

A. That is correct. We were going to dump some of it into the fills, and some of it into the waste.

Q. Where were you going to dump the material? What place? Then I will take up the place.

A. What is called the cast job, starts about 255, then go on up the line.

Q. In other words, before you got to Station 255, you never expected to dump any material.

A. No, we didn't look for any cast.

Q. All right, I will take Station 255 anyway.

A. No, no. The lower work was not cast work, but it was team work, wheelbarrow work.

Q. Mr. Rajotte, will you look and see if that profile is initialed. You say you always initialed your maps and profiles.

A. Well, it is customary, because the contract isn't supposed—

Q. Did you follow your custom in that case?

A. I am not positive.

Q. You have got it in your hand, you can see.

A. I know, but it has been through the work. If it is on here—I will look it over. If I see my own "F. R." on it, I could tell you. Probably all wore out. This has been over the work. I don't see any.

Q. Then if we produce a map that we say was like one submitted to you, and it hasn't your initials on it, that doesn't necessarily mean it was not submitted to you, does it?

A. No, not necessarily so. No, no. In fact, I might have looked at this map, as I say, but I don't see how I could have looked at the map and ordered the machine to the front. That is where I am questioning.

Q. When we show you the map, it may recall it to you. I am not trying to catch you or anything. What I asked you was, if we show you a map, and it hasn't your initials on it, simply because it has not your initials, you will not say the map was not, or a like map was not presented to you?

A. Well, I wouldn't say it wasn't presented to me, no.

Q. What?

A. I wouldn't say it wasn't presented to me. I might have seen it.

Q. I mean on account of the initials, simply because your initials don't appear on it—they may appear for all I know, but simply because they don't appear on the map, you don't mean to tell the Court the map wasn't submitted to you?

A. If my initials are not on this map?

Q. Does that mean the map was not submitted to you?

A. Not positively, no. I might have seen the map. No, no, because there is always maps to these jobs. Generally where there is a profile, there is a map, sure.

Q. And there is no reason to think—

A. No reason to think whatsoever.

Q. No reason to think this was any different from any other case?

A. No, no reason to think anything any different.

Q. You spoke this morning of having to go back—I believe I am right—having to go back and against your will at Mr. Norris' orders, and complete the road bed, or regrade, whatever you want to call it, between Station 107 and 122. I believe I am right there. That is, in a general way.

A. From the Southern Pacific crossing, Station 100 and from 1 to 16.

Q. I am just speaking now of 107 to 122?

A. Yes.

Q. You told the Court this morning that you had completed that road bed to the satisfaction of Mr. Cole, who was the defendant's chief engineer when you first went over there, but that Mr. Norris, our engineer at that time—this gentleman—required you to go back and change something. Am I stating your testimony in general?

A. That is correct; change is right. That is to grades and alignments.

Q. Do you at this time mean to say that road bed was really completed between 107 and 122 when Mr. Norris made you go back, if he did make you, as you said this morning?

A. There was a suitable quantity there for the road bed, and the profile that you have here laid out.

Q. Sir?

A. There was suitable quantity put in according to the road bed on this profile.

Q. I thought you didn't go by the profile?

A. You have to go by the profile. You can't go by anything else, as to alignment or as to grades. We are talking about before, but after you start in, the engineer gives you the level to go on. The contract has nothing to do with that.

Q. Then the road bed between 107 and 122—we may have it a station one way or the other.

A. Call it 100 to 122.

Q. 100 to 122?

A. Yes.

Q. Was completed as that profile there called for?

A. Yes.

Q. At the time Mr. Norris, you say, required you to go back?

A. As to the grade that was wanted in there by Mr. Cole, yes.

Q. How do you know that, Mr. Rajotte?

A. Because the grade stakes were run across it at the time.

Q. Did you see it?

A. Sure.

Q. Did you make a note of it?

A. I didn't make a note. Why would we leave there?

Q. So it is a conclusion?

A. The track was down on it. We crossed over the main line track. If suitable to put an 80-ton machine over, it is surely good for a logging line.

Q. Was that the permanent track?

A. Yes.

Q. Suppose it develops, and we ever convince you that no track was on the road bed between 100 and 122, when you went back there, what would you say?

A. You can't convince me. You can't convince me on that, because we had already done it.

Q. I withdraw my inference there.

A. That is an impossible thing.

Q. Yes, your track was there.

A. It was finished and called good.

Q. Your track was there—I was mistaken about that.

A. That is why I can't understand how your yard plans come in for more material when we didn't know anything about it, or put it in at the time.

Q. You had completed this road bed, and the track was down there?

A. Yes, sure the track was.

Q. How much done?

A. Dressed it, and laid the track, and tore out three foot track, that is, the first three foot track, tore that out and made standard track.

Q. What did you go back for?

A. To raise the grade. We went back and raised the grade on account of high water.

Q. Didn't you have to raise the rail?

A. Sure; that is what made it so expensive.

Q. How much did you raise that?

A. Raised it about three feet. Here is the point I want to give you. The track that was raised three or four feet at that time today is probably down three feet. We were under water there. There was no drainage in that fill, they didn't put drainage in that fill until after the railroad got there, and put pipes in the lower end. It couldn't stand up. They were digging alongside some kind of work in the highway.

Q. Whose duty was it to put the drainage in ?

A. The engineers.

Q. In other words, the Whitney Company's duty to put the drainage in?

A. They locate all drainage.

Q. Where do you get their duty from?

A. Duty? From the duty of the chief engineer, or his assistant, in any railroad, any western railroad.

Q. But, if it was for the Whitney Company, or the Whitney Company's chief engineer to build that grade, you were employed to do that?

A. Yes, under his direction.

Q. I am asking you whose duty was it to prepare that drainage, or ditches, or what not?

A. To prepare it?

Q. To drain it. I don't care what you call it. You say the drainage system was not in. Whose duty was it to put it in?

A. The engineer's duty to order it in, and have it in there at the start.

Q. He had to order you to do it?

A. Sure he did. We can't do them things.

Q. You couldn't do any work unless he ordered you to do it?

A. No, I couldn't go and put a pipe in his grade in there, or I couldn't put a pipe on the Southern Pacific.

Q. If you knew that drainage was necessary there, unless Mr. Norris told you to go ahead and put that drainage in, you could stand back and not do it.

A. Why, if the profile shows drainage in there and they provide the pipe and have it there, we put it in. I can't order a pipe in the grade at any place.

Q. Suppose this track specifies dimension and everything of the ditches of all kinds?

A. Yes, which it does.

Q. Do you concede you could sit back until Mr. Norris came to you and said: "Look at that water. Put in your drainage system."

A. Sure, he had to order that in.

Q. You didn't have to build any road bed. He had to come to you and order you to build the road bed?

A. How is that?

Q. You couldn't go ahead and build the road bed until he came and ordered you to build it?

A. No, where working on the road bed or anything like that; we could leave an opening in the track to provide for this water, something like that, but in this case the thing was built, the water came up, and the drainage was put in afterwards.

Q. What kind of a drainage did you need there?

A. Concrete pipes, pipes of some kind.

Q. Would that be culverts?

A. Culverts, and the like of that.

Q. Did you see anything in the contract you were to build culverts?

A. I was to build culverts on force account.

Q. Yes.

A. Sure, but I have to have orders for that. I can't build a pipe, and the engineer come along the next day and say take that pipe out there. "Who is going to pay the labor for anything I don't order?"

Q. Could you tell one of your men to take up

some dirt from this spot, if Mr. Norris had not ordered you to do it?

A. No, I am not confined down like that at all. Mr. Norris told me, "You go get that 5,000 yards out, as quick as you can, and put in the fill." And I put in the fill. And he comes back and says, "Why don't you put in a pipe?" And I says, "The plans don't call for a pipe."

Q. The contract says you are to put in all culverts.

A. Sure, that contract don't say I do the engineering, does it?

Q. No.

A. Then I couldn't have anything to do with the pipe.

Q. It says you shall put in the culverts?

A. Sure it does.

Q. Look at that point and see what the profile specifications are?

A. Nothing.

Q. What stations is that?

A. 101. That is the lowest spot; shows drainage pit of the Southern Pacific there. That is where the pipes ought to went.

Q. Maybe yours is not like mine.

A. There is the crossing. See that little notch. That is the old borrow pit the Southern Pacific built. That is the lowest place. This is where the fill is.

Q. What does that say up at the top of this. Read that? ?

A. That is what I mean. It says, "Pipe" there in two places, three places.

Q. Yes.

A. Yes, but the pipe is too high up there to take care of the grade.

Q. I thought you said that didn't show any culvert?

A. It doesn't show culvert in the proper place to drain the fill. Had the fill been drained right, the railroad would have been running fine, and we wouldn't have went back on it. You can't hold water on light fill.

Q. How far out of plumb is that?

A. I won't say out of plumb. Plenty of water where they were, but should have been more drainage and lower spot; where, for instance, put their pipes, don't sink in natural ground—keep them out.

Q. Did you ever object the drainage was not proper?

A. I have no objection to drainage, no. We were through in good weather, and got across there all fine.

Q. At that time did you object they didn't have proper drainage there?

A. No.

Q. Did the Whitney Company have anything to do with the weather?

A. No, nothing at all.

Q. Were you familiar with the seasons down there?

A. Sure; wet.

Q. You knew when was wet and when not, down there?

A. A rotten place, like.

Q. You knew about it when you went in there, when you contracted?

A. I knew about it; that was what I was afraid of all the time, in the contract.

Q. In December pretty wet down there?

A. Quite wet.

Q. The last of November pretty wet?

A. Yes, and had an awful wet spring up there.

Q. Likely to have that?

A. You bet.

Q. You knew you would be working wet country?

A. Yes.

Q. And you knew that overflowed there sometimes?

A. I didn't know it overflowed.

Q. If you had examined the ground you would have known it.

A. If I had levels of the ground, or took particular notice—in other words, the way to find this is not at the spot where the water is, but go back to the basin where the water starts, and see from the contour of the country where the water comes in, but I never looked for that much water.

Q. In other words, you didn't look for that much water?

A. No, I thought he had land in there, and was bad land.

Q. If you had examined it like you say you did in your complaint, made a careful examination of the territory over which this road bed was to run, you would have known that?

A. Why, no, I wouldn't have known it. I wouldn't have known that.

Q. Then the careful examination made by Mr. Cole or Mr. Norris of the Whitney Company would not have shown it either, would it?

A. No, it wouldn't show it.

Q. Then that was unexpected element, wasn't it?

A. It was, but it wasn't necessary to go back at that time and raise the grade. We had only the material to go over there to the front.

Q. Would water be over the track?

A. Lightly over it.

Q. Could you go on and use the track just as well?

A. Yes, could go over it. We were going over it, going to and fro every day.

Q. Was it very safe to go over that?

A. Was good enough for the ton locomotive we had. We only had small ones.

Q. You couldn't make much progress that way, could you?

A. Wasn't much progress, because we come out with a car of coal once in two weeks; that is all we needed.

Q. It was better; in other words, it would facilitate your handling of supplies.

A. Yes.

Q. And fuel, if that was raised at that point, wouldn't it?

A. No, it wouldn't facilitate it at all.

Q. Why?

A. Because we come through there all winter just the same.

Q. No matter how soggy. You say now that is probably sunk two or three feet since then?

A. No, I say the grade, the settlement in the grade there would be sunk.

Q. Then when you come down to it your only complaint, I take it, is they had you do it at that time, had you come back and change the grade?

A. Yes, and not let go ahead on the upper work.

Q. You are not objecting they had to change the grade, not blaming them for inefficiency?

A. We were down there once on short haul, and all set in the pits, and everything. Now, why order this move back? Why the extra expense?

Q. When you were there, Mr. Rajotte, could you have told it would be necessary to raise that grade? Just answer the question, then you can make any explanation you want.

A. I could have been told, yes.

Q. I say, could you have told, from examination there, you needed a better grade?

A. Well, I didn't know at that time how good a road bed he wanted when he started out.

Mr. Dobson: It seems to me it is asking a lot of questions on the engineering part of the work. The burden was not on the contractor to do those things.

COURT: He can answer the question.

Mr. Dobson: Save an exception.

Q. I will repeat my question, since I don't think your answer was responsive to it. At the time that the Rajotte-Winters Company left that part of the road bed, 100 to 122—Stations 100 to 122,—could you or your company, by a proper examination, whatever that means, have told or known or ascertained that it would be necessary to raise that grade three feet in order to keep above water?

A. No, I don't believe you could.

Q. Them by the same token the Whitney Company couldn't have told?

A. Yes.

Q. That is right, isn't it?

A. I don't know how good the judgment is between the two of us. They might, as engineers, have gone back. I can't check those basins back. In other words, when you go to put in drainage, you go back to the foothills, and you find the place there where there is water, and see what the fall is, and everything, and they check back with the area against what drainage they should have at these crossings. We never check back, see?

Q. Did you—meaning your company—ever haul a carload of coal over the track at the point between Stations 100 and 122 before this change was made?

A. Yes, we hauled coal over it, yes.

Q. Are you sure of that?

A. Yes.

Q. Where did you haul it to?

A. We hauled it up to the shovel working ahead.

Q. Sir?

A. Everything came out over that track.

Q. You hauled it right over the track?

A. Sure.

Q. Were you hauling it about the time Mr. Norris wanted you to go back?

A. Why, we hauled it right up to the machine two miles ahead.

Q. How strenuously did you object to Mr. Norris because he wanted you to go back and fix the road bed at that point?

A. Why, we wanted to put a little of the material where the shovel was at the time back there. Was good solid rock up there, we wanted to put a little of that on top, and let it go like that for the winter. Then they could trim it up.

Q. Did I understand you wanted to bring the shovel back?

A. No, we were digging then about Station 230, I think, along back of that. We wanted to take a little bit of that material and put it there.

Q. How did you want to take it—by cars?

A. On standard gauge track and dump it there. Wouldn't take very much, and let it go like that for the winter, and get up ahead.

Q. Did Mr. Norris want you to go back?

A. Said he would rather complete what Cole had opened up.

Q. Did you talk to him? Did he talk to you personally about that, or did he talk to Mr. Glavin?

A. Talked to both of us,—whether talked to me—I think he talked with me personally about it.

Q. Awhile ago you said you didn't remember whether or not—

A. I won't say positively.

Q. You said you didn't remember whether or not the shovel had already gone back before you came on the job?

A. Well, I don't know whether there was a letter from Mr. Martin or Glavin, informing me about it, whether I knew it had gone back at the time.

Q. How strenuously did you object?

A. Didn't want the machine to go back.

Q. Did you do more than express an opinion?

A. I expressed an opinion as to getting the machine ahead and getting the upper work done.

Q. The defendant is going to put Mr. Norris on the stand, and he is going to say you didn't object.

Mr. Dobson: That is objected to, what you are going to do with Mr. Norris.

Q. What I am going to ask you now, is how strenuously you did object, so I can get at what you mean. Did you say, "I don't want to do it, Mr. Norris", whatever you call him, "Bill, I think probably we better go ahead," or did you say, "Here, you are intermeddling, and I want to go on ahead." What did you do?

A. No, I said it is not what call railroading, to go back and do that work. What I wanted to do is to get across the bridge and go ahead. That is what I tell you.

Q. Did Mr. Glavin agree with you?

A. He agreed with me.

Q. And Mr. Norris was the only person of the Whitney Company that spoke to you about that?

A. Yes, he was the only one at the time. Yes, he was the only one.

Q. Who moved that shovel back?

A. I guess Glavin.

Q. That is your crew?

A. Yes, sure.

Q. Whatever expense there was in moving that shovel back was paid by the Whitney Company, wasn't it?

A. Correct.

Q. They paid you a percentage profit on that also, didn't they?

A. On that work back there.

Q. On whatever—

A. On the moving?

Q. On the moving?

A. Sure.

Q. Yes, that was the same as any other work?

A. That was the same as any other work, only it took the time away on the completion of the job.

Q. I understand you say it delayed you going ahead?

A. You bet.

Q. I just wanted to get it clear in the minds of the Court.

A. In other words, two moves, when we only should have one.

Q. But you were getting reimbursed for what you put out, and you were getting your percentage profit on that.

A. No profit on this work. Such a word never entered.

Q. You were getting five per cent, cost plus.

A. They had what the contract specified on the bills, on the payrolls.

Q. They were reimbursing you for the amount of labor, and adding five per cent to that?

A. Yes.

Q. Whatever you call it; we won't bother about that.

A. Yes.

Q. And they were paying you rent on this steam shovel on the basis of \$1500 a month while you were moving back?

A. Yes.

Q. How long did it take you to move back?

A. It wouldn't take very long.

Q. You can refer to any records.

A. Nothing on the record on that. No record of it when moved back.

Q. I thought you said two days. Do you know?

A. No, I will have to get the records, check the time, because I guessed at the time on the other your cost. I think I am right.

Q. You testified that considerably increased move, as near as I could. Doing too much guessing.

A. Cost of the railroad; cost, yes.

Q. Now, you spoke about a warehouse that was suddenly thrust upon you.

A. A warehouse site.

Q. A warehouse site. At the time you entered into this contract you said you didn't know that the warehouse was to be built at the station—what was it, 1 to 4?

A. Yes. I knew of nothing only the connection they had with the sidetrack. That is all; what this profile shows.

Q. You didn't know that a warehouse was to be built?

A. No.

Q. And you don't remember the map, so of course you can't remember—you don't know whether you saw it on a map or not?

A. I don't ever remember of seeing any map outside of this one.

Q. You said that you learned that Mr. Norris was to succeed Mr. Cole. Did the Whitney Company write you a letter on that subject?

A. Why, I knew that Mr. Norris was to take Mr. Cole's place.

Q. How did you know it?

A. In conversation with Mr. Hawkins would be about the first way I would get it.

Q. You have personal knowledge of all those changes which you claim were made and you testified to this morning?

A. Yes, sir.

Q. And yet you say that you were down on the

job only once some months, twice other months, and maybe three times some months?

A. Yes, sir.

Q. How does it happen that you personally were there when these changes were to be made each time?

A. I wasn't there when all these changes were to be made.

Q. Sir?

A. I wasn't there when all these changes were to be made. If there was some change that wasn't right, I would be notified on the phone, say they are making a change. If I could get away I would go on down. I had other work to look after.

Q. You had telephone notice or letter?

A. Sure.

Q. As to each of those changes you spoke of?

A. No, not as to each of them, probably didn't have two letters on all the changes. Was immaterial to us. It was the engineers. The only things was these first changes, and not getting up ahead, and getting the winter's work done.

Q. Changes were immaterial to you? You weren't concerned on that, you say?

A. Except the first changes. You understand the little changes we don't go so much on them.

Q. The first changes, you say?

A. The first changes was the main change that spoilt the job or getting the job done.

Q. Which were the first changes?

A. The first change at Station 17; and then going back from Mile 3 to 17, those two changes.

Q. How long did each of those consume?

A. They kept us around there until December, knocked us for our winter's work ahead. Understand we only had 7,000 yards we wanted to dig with a machine and get out of there.

Q. Do I understand you to say if it hadn't been for these two changes you would have finished this job by January 1, 1920?

A. By January 1, 1920. On the line as Cole described it, yes, sure.

Q. Well, as a matter of fact, you didn't finish up the nine miles, nine months after January 1st, isn't that so?

A. That is correct.

Q. How did you consume that extra nine months when you were only delayed three months by that first delay?

A. Well, nine miles alone your quantities ran over so much, you built another style line; you gave us thorough cut, loading, hauling, dump.

Q. You say these changes you didn't particularly care about; just those first two.

A. I meant as to my being notified. I didn't care about every little change. I wanted to work in harmony.

Q. How did Mr. Glavin know what changes you wanted to be notified about?

A. His experience would show him when that was up how much he wanted to tell us.

Q. Have you any of those letters he wrote you?

A. I don't think our files has over a dozen letters on the job.

Q. You were down there and personally know about each of the changes you testified.

A. Any change that I testified I am there, I was there.

Q. That doesn't answer my question. Each of those changes that you testified about as being a fact this morning?

A. Yes.

Q. You know of personally?

A. Yes.

Q. Now, you spoke this morning of being held up by the failure of the Whitney Company to have a bridge in, didn't you?

A. Yes.

Q. What was the bridge across there, what body of water?

A. Clear Creek and Down's Creek.

Q. Yes. Is there anything in the contract, this contract, or any other contract between you and the Whitney Company that requires them to build a bridge?

A. Nothing in the contract that I know of. There might be; I don't know.

Q. Did you think that the Whitney Company—was it your understanding when you were making these plans, that the Whitney Company had to build a bridge across these places?

A. Yes, sir.

Q. Where did you get the understanding?

A. Because I recommended and took care of the bridge contracts, and their ability I knew.

Q. That was the time you signed the contract?

A. No, that was afterwards; a couple of months or six weeks afterwards.

Q. As far this contract went, the Whitney Company didn't have to put a bridge in, did they?

A. Yes, they did.

Q. Where do you get it?

A. Why, we were both working together to cut the cost down, in harmony, and the Whitney Company had made an agreement with the contractors, the bridge contractors, and were going to get these bridges in ahead of us.

Q. Was that before or after you signed the contract?

A. After.

Q. I know, we will get to that. When you entered into the contract, was there anything in your mind that made you believe that the Whitney Company had to put in bridges, or were going to put in bridges?

A. Well, the lineup that we had with Mr. Hawkins and Mr. Cole was that they would do their utmost to get the bridges in, and we wouldn't undertake to do the work ahead of Clear Creek and Sam Down's and sign for January, 1920, unless they did.

Q. Did you have that understanding with Mr. Hawkins?

A. I didn't have positive understanding, but we

both knew from the engineers and myself; common sense.

Q. You don't contend, do you, or do you contend the Whitney Company was obligated to put in the bridges?

A. Sure, I do.

Q. Where do you get it now? Was that experience again that taught you that?

A. Well, it was the understanding that bridges were to go in. We were to jump Kilchis River, and go on the ground across Kilchis, and they were to have the other two in.

Q. Who obligated the Whitney Company to do it?

A. There is no obligation in that contract. That is cost plus a percentage contract, but when somebody, an engineer tells you something, you figure he is going to carry that out to the best of his ability, like I would with the contract.

Q. Who told you?

A. If it had been a unit price contract, that would have been signed up in there to get the bridges done. That is, we took them at their word, they would get them done, and they tried to get them done.

Q. Whose word?

A. Mr. Hawkins and Mr. Norris, or Mr. Cole.

Q. That was all before the contract was signed, was it?

A. We had taken that matter up before the contract was signed, took it up before and after. That is,

they agreed to do the best of their ability in things out there, to let us up the line.

Q. Had they mentioned bridges?

A. Yes, dwelt on bridges.

Q. Mr. Hawkins, before you entered into the contract, had agreed, for the Whitney Company, to put these bridges in there before you got up to there?

A. If it was possible to do it. He didn't positively agree.

Q. I understood you to say he did the best he could to carry that out.

A. He did. Yes, they did, you bet you.

Q. Why are you in court complaining, trying to get money because you were held up because the bridges were not in?

A. They done the best they could.

Q. You expected them to do more than they could?

A. I won't say the bridges couldn't have been put in. They made a hard try at it. In other words, they only delayed us a short time.

Q. You had made a claim in here against them for big money on the ground they didn't have the bridges there, and you couldn't push your steam shovel across when you got there. Now, you come in and say they did the best they could. Is that fair?

A. They signed up a contract to deliver the material to the bridges, as I understand. With the bridge contractor. In other words, in this kind of construction the bridges are always put in ahead.

Q. Now, you have fallen back on custom. It is the custom.

A. It is customary, yes.

Q. You have gone from experience to custom, and they did the best they could, didn't they?

A. I will cover it this way. Had they put the bridges in, they would have saved money for themselves.

Q. It is not very likely they would not exert every effort to cut the cost, is it?

A. As I said, the bridges could have been put in ahead of the shovel.

Q. Could the Whitney Company have done it?

A. Yes, they could have done it.

Q. I thought just now you said they were doing the best they could.

A. Considering the times, and the labor, and one thing and another, they done the best they could.

Q. Do you know what an effort they made to get the piles up?

A. You bet.

Q. Do you know Henry Sauce?

A. Sure. They had a great time. They had a tough time.

Q. Do you remember the time Henry Sauce was hired by the Whitney Company to pull logs out of the river bed?

A. Yes, I think they had a contract with somebody for getting them out of there.

Q. Who did this bridge work?

A. Parker & Shea. Shea & Parker, I think it was.

Q. Did you get anything out of that, sir?

A. Yes.

Q. How much did you make out of it? I don't mean the figures. What per cent were you to get out of it?

A. If they done well, were to give me ten per cent.

Q. In other words, you were to get something on the side, on this job.

A. Not on the side.

Q. I don't mean underhand.

A. Will you let me tell you how it went on that contract?

Q. Yes.

A. It come to the time when the bridges—we had to get a move on then. I think Mr. Hawkins had some bids. I can't say whether he did or not, but he wanted me to get a good bridge man, to recommend a bridge contractor. Shea & Parker had both worked for me, from the ground floor up, drove piles and done all kinds of nigger work—good men. I recommended them and took them up there, and Mr. Shea said to Mr. Hawkins—Mr. Hawkins asked Mr. Shea what he would do it for, and Shea said, “any fair price, Mr. Hawkins. What will you give me?” Mr. Hawkins set the price. Now before I took Shea up there, he told me he had a pile driver, full equipment, could load on the car and get it away within a week, and I had recommended him to the com-

pany, to Mr. Hawkins. All right, the week was up, and I said to Mr. Shea, where was his pile driver layout. He says: "We can't pull the rig off that job." I says, "I have to make good on this thing. We have to be there." Well, he promised me he would let Parker stay on the job, not leave the job, and Parker had worked where I was, and knew his business. I thought if got Bud down there, had his good experience, I could get right through. They had no pile driver. Well, I had OK-d the men, so I told them they could get a driver, and I would pay the bill. He had no money to carry himself with, so I told him I would carry it and take ten per cent on the job, if he wanted—if he came out straight. Fine. That is how I got out of that entanglement, and it come out we made a little money on it.

Q. You made a little money on the job, in addition to the other work?

A. I made a little, and that is the only money I made on that, on the whole job, is what I made of Parker. I state that now.

Q. Under the contract, Mr. Rajotte, you were to erect temporary trestles, weren't you?

A. Yes, sir.

Q. Why didn't you go ahead and erect a temporary trestle?

A. I wasn't to erect temporary trestle—you mean for the machines. They were permanent trestles.

Q. The approach to the bridge.

A. I was in this manner. If the rig was there,

and them boys could do it cheaper, while they had the rig there getting across, that is fine; run across. Whitney was paying the bills, why me bring in a rig there. That would be folly.

Q. Under the contract you were to erect the approaches?

A. Yes, approach to the bridges, yes.

Q. Wasn't your delay you charge against the Whitney Company's failure to build the bridges, really caused by your failure to have the approaches built on time?

A. No. In this charge here there is only the charge there one time the shovel ran up to here and stopped. That don't mean one. That means the few days it stopped, but you have to do a lot of preparatory work in hauling material, which I think they did. If this stuff has to be done cheap the day the fellow turns the bridge over to you, you are there; that don't signify nothing. Furthermore, after laying off a few days, the organization is always bad, then you have to reorganize again; that brings up the cost.

Q. Now, do you mean to say your failure to have the bridge approaches there did delay, or did not?

A. There was a slight delay in the bridges.

Q. That delayed you.

A. Slight delay. I am not kicking they did not try hard enough, you understand, because they did.

Q. When did you first learn the Whitney Company was going to take over this work under the provisions therefor in the contract?

A. Oh, I believe Mr. Norris kind of intimated that to me a month before, probably.

Q. A month before September 25th?

A. About a month before we quit. It came in very sudden, but I had a little—

Q. What is that?

A. It came in sudden. I didn't expect it when he came in, but I had a hunch.

Q. How did you have that hunch?

A. They were moving in the stuff then. They were going to work.

Q. Sir?

A. We had a mixed camp. They had sent their camps in ahead, and they had already built camps at headquarters. They were up in there, and had some of their men up there to get the line up, to log.

Q. You didn't really know it until you got the formal notice, did you?

A. Well, I didn't really positively know it but I surmised they wouldn't want a contractor up there. They bought a steam shovel of their own. They had six yard cars, they had locomotives, and for that reason any man who could manage a piece of logging he could manage the men on a little bit of grading. It was cheaper for Whitney to do it.

Q. You had a surmise?

A. Sure; I knew that naturally it would come.

Q. But when it did come, it was pretty sudden?

A. Well, I think from the service we gave, we should have had a few days' notice, is what I would say about it.

Q. A letter was put in evidence you received from them. You understood from this letter they were taking it over?

A. Yes.

Q. Under that provision in the contract?

A. Yes, they wanted to continue themselves, do their own work.

Q. But that says they were taking it over in accordance with the provisions of the contract for taking it over, doesn't it?

A. Yes, sure it says it if it is there.

Q. You felt they had a right to take it over, didn't you?

A. At any time. Any time during this construction they had a right to take it over. I told them that.

Q. I heard that this morning.

A. Sure I told them that.

Q. You are not complaining that they took it over?

A. I am not complaining.

Q. I just want to clear the atmosphere.

A. No, I have no complaint to make at all.

Q. They took it over rightfully, didn't they?

A. Sure, rightfully; correct. Except, as I say, today you have a bunch of men, and everything. I think, just as I say, if the superintendent or engineer of the Whitney Company should have gone to my superintendent or partner and said, "Probably in the next few days we will lay you off," it would have been

cheaper for the Whitney Company, and everybody else.

Q. He gave five days' time?

A. That was plenty of time.

Q. You mean just as a matter of courtesy?

A. If you go and give a man good service, and he cans you, you can't feel so good about it. He had the best we had up there.

Q. You think he didn't show proper appreciation?

A. Didn't show proper judgment; I don't think he did.

Q. But you are not complaining—

A. I never complained, though.

Q. —that they wrongfully did it from a standpoint of their rights?

A. It didn't bother me or the management. We had plenty of work.

Mr. Freed: Now, if the Court please, we haven't a transcript of the testimony this morning, and therefore it is impossible for us to finish our cross examination, and we would like to dismiss the witness now, if we may have the privilege of cross examining him when he is called again.

COURT: I suppose you will have that privilege.

Mr. Dobson: I don't object, although I think counsel was rather thorough.

REDIRECT EXAMINATION

Questions by Mr. Dobson:

I just want to go into a few matters here that Mr.

Freed brought out. When you talked of the additional expense due to delays in putting up these bridges you had in mind, did you not, the expense incident to the general disorganization of your forces; is that correct?

A. Just actual time lost, you see; monkeyed away; lost time.

Q. Didn't these delays generally disorganize your work?

A. It did; it does. Any time you lay off.

Q. That was the principal cause of your complaint in this first case, in the beginning of the work, was it not?

A. Yes.

Q. General disorganization. When you said something about immaterial changes, you didn't mean to convey the impression to the Court that the changes to the line up above Klichis River there were immaterial?

A. No, no. The first little minor changes. Oh, no, not the line above, no.

Q. Now, while we are on this subject, when you entered into this contract you say you went by the profile, estimates shown on the profile and character of the work, etc., in conjunction with your conversation with Mr. Cole, and your examination. Is that right?

A. Yes, sir.

Q. And the yardage shown in the contract on the profile?

A. Yes, sir.

Q. Did you also at that time consider that there might be some changes or deviations?

A. Yes, sir.

Q. Did you make due allowance for that?

A. Yes, sir.

Q. Did you have in mind the changes that were made?

A. No, not the changes that were made.

Q. From your experience, Mr. Rajotte, is it or is it not a fact that you always make in contracting on this class of work, you make some allowance for change?

A. Look at the profile, look at the quantities on the bid form, and that is what we expect to do.

Q. Was there any discussion with Mr. Cole or Mr. Hawkins, or any one that you talked to prior to making this contract, to warn you in any way that there would be such increased quantity to move, or such conditions to encounter as you did encounter in this work?

A. None whatever, only that—you said as to conditions.

Q. Yes.

A. Myself and Cole thoroughly understood one another that we had to get in ahead, or we wouldn't get done.

Q. Now, referring to this drainage proposition. You have been engaged in this line of work for a good many years, as I understand it?

A. Yes, sir.

Q. And you are familiar with the customs in that line?

A. Yes, sir.

Q. Is it the custom for the engineer to decide upon the drainage of a district or road bed to be built?

A. Yes, as a rule, yes, he is the man.

Q. That is the engineer's duty?

A. That is the engineer's duty.

Q. Is it the duty of the contractor to do that?

A. No, it is not the duty of the contractor.

Q. I believe you said—

A. That is as to location of pipes for drainage.

Q. Well, drainage means the proper location of the pipe so as to take away the excess water that might accumulate over the road bed. Is that what you mean by drainage?

A. Yes.

Q. No, Mr. Rajotte, there was something said about your knowing weather conditions up there. Had you had any work of this nature in that country before?

A. Well, have worked from Vancouver to the California line on the coast. Odd spots a little different.

Q. When you first met Mr. Cole, that was in 1917 or '18, wasn't it?

A. 1918.

Q. You didn't make this contract for one year thereafter?

A. Met him in the middle of 1918, and went out early in 1919, and made the contract in June, 1919.

Q. Now, in going over this work at that time, with Mr. Cole, referring to the profile, referring particularly to that part of the right of way or road bed shown between Southern Pacific Track at Station about 100 up to 150 or 154, was there anything apparent to you at that time to indicate that that road bed as indicated and laid out on the profile would be below the water mark?

A. No, there was nothing there at the time.

Q. Was there any discussion between you and Mr. Cole in that respect?

A. No.

Q. Now, one other point. Referring to this instance which I questioned you about on direct examination, and Mr. Freed questioned you about on cross examination, that was the incident where you were required to move your steam shovel back from Station about 231 back to Station 17 to fill in this particular section we are talking about. Mr. Freed asked you if the shovel had been moved back at the time you talked with Mr. Norris, and I believe you said you didn't know.

Q. In checking myself on that I objected to it, so it must not have been moved.

Q. What I want to get at, I want the court to know whether you did actually know at that time whether that shovel had been moved back to this point, or started to have been moved?

A. I think I knew it was going to be moved.

Q. To get at the real facts, do you now recall at about what point upon this road bed or right of way, or your operations you met Mr. Norris at that time?

A. Around the camp at 145. It was along between about 145 and 150.

Q. That is where you met Mr. Norris?

A. Yes, that is where we had our camp.

Q. Do you recall whether there was any one else present at that time when you had that conversation with Mr. Norris?

A. Why, there were three or four, but I think myself and Matt talked with Norris at that time.

Q. When you say Matt, you mean whom?

A. Mr. Glavin.

Q. Your superintendent?

A. Yes.

Q. Are you able to state at this time whether he was there or whether he was not there?

A. He was there.

Q. You are certain about that? You are sure about that in your mind at this time?

A. Yes, Matt started the work, and he was there that fall, all fall.

Q. On direct examination, in relating to this matter, you said that you informed Mr. Norris at that time that it would cost him approximately \$15,000 to make this move at that time?

A. Yes, I made statement of that amount.

Q. Does that refresh your memory as to whether or not the shovel had been moved?

A. I don't know whether the machine had gone

by, or not—had gone back down or not. I can't positively say.

Q. In any event you know you had conversation with Mr. Norris concerning it?

A. Yes. The only way I can check that, is from the daily record. Every day—most of the days I was there, the daily record will show, and the daily record will show when the machine went by.

Q. While we are on that question, so the court may better understand the difficulties encountered on that move, I wish you would tell the court the character of the pit which you were required to move the steam shovel, and the condition under which you had to work at this time?

COURT: The first move or the second? 234
back to 17?

Q. I think that was—

A. 231 back to 17. That is Station 230 back to 17.

Q. Well, Mr. Rajotte, the pit that you opened up for the purpose of making this extra fill through there, was that substantially the same location you had your shovel in on the first move?

A. It was the same material on the opposite the side track. There was a flat there.

Q. In other words, both of these pits that you operated from when you moved your shovel back, were substantially the same location; that is to say, Station 17?

A. Yes, practically.

Q. Now, Mr. Rajotte, what I want you to tell

the Court, referring now to the second move of the shovel where you moved it back for the purpose of making a fill across the tracks, 107 to 122, or thereabouts, just tell the Court the character of the pit you had to place the shovel in, and the condition, and the difficulty you had to work with at this time.

A. Why, the level of the ground where we put the machine in, the borrow pit the top of it was practically level with the track, and we had to sink with the machine, and we had kind of conglomerate and cement gravel, and we dug five or six or seven lift along there. That would be underneath the old track, and there was no drainage there, but the material was hard, and when we got down there you see we were practically at tide level, and everything had to drain in the pit, so we had soft track and bad track to take care of. The men had to work in gum boots in there; very expensive pit, and one of the most expensive pits on the job.

Q. Was it raining at this time?

A. Raining quite a bit; no drainage—enough drain to the pit.

Q. In that connection you have alleged in your complaint here that you had to employ from twenty to thirty more men. Just explain to the court why that was necessary?

A. Well, the fill was soft where we dug the material out. That is what we came back for, the reason we filled.

COURT: Are you referring to 17?

A. You see this profile at this plant here, Sta-

tion 100 east, and from this point here, where you come this way, starts at one, two, three, four, ten, a thousand feet. This is from one to forty. This was from hundred out that way. This was Station 17.

COURT: When you raised the grade, it was from this point?

A. Were all filled grades in here.

COURT: When you moved the shovel back in order to raise the grade, how far back did you move?

A. About here, about two miles.

COURT: Moved back to 17?

A. Yes, then opened another borrow pit, and raised this grade through here. Then the track is down the cut here. The first grading that had been done, but had been brought up to the grade that the engineers gave us through there.

COURT: That is from 100 to 120?

A. Yes. So we went back, and that is the kind of pit I opened up, and of course low dump. Then they ordered grade for side track.

Q. So that at this time you moved back that was additional work?

A. Additional work, yes, plus this in here they put a connecting track; that shows right here. They filled all of this in here and made a little yard. We put a roundhouse and machine shop in there, and warehouse in here, and couple of switches up in here, and we had to house extra men to take care of the material on light dump, and extra men in the pits. It was impossible to get men in the pits unless went in

two or three feet. The men had to wade in with boots.

Q. When you say you had increased cost in operating the steam shovel at that plant, just tell the Court, as briefly as you can, the force of men necessary to operate the steam shovel plant from this point to make this fill. That includes the forces here and the forces up here. Just explain to the Court that situation.

A. Well, in other words, three—you can operate a machine with no loading and cast. Take about ten or twelve men, ordinary run, with average material, short haul; not large overhaul; we carry twenty-five or thirty men, that is a full crew of machine men. In a fill of this kind you have to take and keep the men on the job, sixty or seventy men.

Q. Why was it necessary to have so many men on the dump?

A. You didn't have heavy enough raise to get rid of the material; has to be scattered and taken care of.

Q. What was the condition of the material at that time?

A. The material was wet, as we took it. It was pretty good material. Of course the bucket had to hit the water going out, and when got to the bottom, had a soft bottom, had a lot of material to put in there.

Q. Was there any difficulty in getting this material out on the dump cars, when you come to the point of wanting to put on the cars?

A. Yes, while operating there the rain ceased. We worked in the snow and frost, too.

Q. What did that mean with respect to operation?

A. More expense in picking out this track and digging out the cars. Had to clean the cars regularly, and all that work, getting the sand and dirt.

Q. Suppose you had done this work during the dry season when the material was dry, how would you have handled the material at this point where raising the grade,—from dump cars?

A. We didn't intend to shovel in there; that was team work.

Q. I am speaking of what would have been the situation if the fill had been dry?

A. If summer in doing it?

Q. As to the matter of getting the material out of cars.

A. It is pretty hard to estimate; we carried four times the crew there at that time of year to what we would in summer.

Q. I don't believe you get my point. I want the court to understand the nature of the difficulties you encountered because of this material there being wet and sticky in getting it out of the cars, as compared with getting it out of the cars if the material had been dry.

A. You want to know as to cost?

Q. No, the difficulties; the nature of the work in the summer time; how would you get the material out of the cars in the summer time?

A. In the summer time only have three or four men on the dump; just enough to spread the material.

Q. Would you need any men in the cars?

A. Put men in the cars to clean the cars out.

Q. Would you do that in the summer time?

A. No.

Q. That is what I want the Court to understand.

A. You see in the summer time we would use about twenty-five men on that, and we had to use about seventy.

Q. I want the court to understand why you would need seventy men at that dump instead of twenty-five men in the summer.

A. The cars had to be cleaned out, so much frost, and working in the pit had to change the labor with wet pit all the time; had to have a heavy crew.

Q. Now I want to ask—one reason for going into the matter is to see whether or not that refreshes your memory as to the conversation you had with Mr. Norris as to the propriety of making that change at the particular time he did. Do you understand the question; do you understand prior? I mean the feasibility or advisability of doing that work at that particular time?

A. Well, I remember telling him that I was giving him—well, Norris complained, put it in dollars as to the amount of money, but that wasn't what the main object was; was about going ahead, up ahead with a shovel, because the winter's work was up there, and we were stealing all the time down here.

Q. Did you, or didn't you, tell him—on cross examination and on direct examination, too, you referred to the fact that it wasn't really necessary to make the fill at that time; is that so?

A. Yes, I advised him it was not necessary.

Q. Was there any discussion between Mr. Norris and you as to the cost of making that fill at this particular time or at some later time?

A. He said it didn't matter what it cost, he wanted to get Cole's work cleaned up at any event, then we would go, that was what he told me.

Q. I want to know, did you or did you not, tell Mr. Norris at this time that this particular change in this grade he wanted made there could be done cheaper at some other time, that is, if he did it at some other time?

A. Yes, I told him that I didn't want the shovel to go back, and I must have talked to Norris before it went back.

COURT: When did you begin work under this contract?

A. About ten days after they had the contract.

COURT: Ten days after the execution?

A. After the execution, yes.

COURT: Where did you commence work first with the shovel?

A. Station 17.

COURT: How long did you work there?

A. We worked there—I have the records giving the dates—over a month.

Mr. Dobson: We will have all that data in detail a little later.

COURT: Then you moved to where—154?

A. No, we went on up to 140—145.

COURT: Before you came back?

A. Yes, we went and done work at 54 and went on to 230, then we moved back.

COURT: That is, moved back a second time?

A. Yes, moved back a second time.

Mr. Dobson: I wasn't sure by the questions asked whether you are clear on this point.

Q. Mr. Rajotte, it wasn't your plan, however, to commence work at Station 17 with a steam shovel plant?

A. No shovel work contemplated at 17.

Q. You were simply diverted, as I understand, when you moved the steam shovel plant from this point there, going across the S. P. track back to 17, and at that time were headed way up the line with your steam shovel plant to 154?

A. We were leaving for 154 to do the first work and then go on above.

Q. When the steam shovel plant arrived at this point they diverted you back to 17, is that the situation?

A. That is it.

Q. Now, Mr. Freed asked you a good many questions bearing upon your ability to determine from what you might call a bird's eye survey of the work up there beyond Kilches Creek. I will ask you this: From your examination of this land or work,

in conjunction with what Mr. Cole told you as to quantity, were you able—were you reasonably certain as to the amount of work you would have to do in there, and the character of the work when you made your contract with the defendant here?

A. I knew the character and the distance.

Q. Mr. Freed referred to dimensions of the road bed; you didn't change the dimensions of the road bed did you?

A. No.

Q. Did you at all times build this road bed in accordance with the directions of the engineer?

A. The roadbed calls for fourteen foot fill, I think and eighteen foot cuts; I think the side cuts would be sixteen. But there is places there where there is a large change in the road bed, but not on account of the contractor. If they were changed, they were ordered so by the engineer.

RECROSS EXAMINATION

Questions by Mr. Freed:

Mr. Rajotte, how did you arrive at the statement that doing this work in the winter, or in the rainy season increased the cost 60%? Where did you get your figures?

A. Steam shovel work, you mean?

Q. Yes, I think that is what you referred to.

A. Take ten men on the dump, four men in the pit, shovel crew and one shovel outfit, which is about twenty-five men, ordinary summer weather here on the Coast. They would probably bring you in six

hundred yards a day on thorough cut work, that is, we dump and load everything, and along in after November, when you get good heavy rains, in that formation of material you would do very good if the same crew could get two hundred and twenty-five yards.

Q. How did you expect to do that work if Mr. Norris had let you have your way as you claim he didn't, and not go back at that time?

A. Now, don't get me wrong there; I don't claim the second move—

Q. What?

A. I don't claim so much on the second move, as to the price, you understand, but at the first, we should have got away above there; but we figured to send the machine up there without any cars, dinkies or track, and send a crew, that is, she would dig and cast and borrow as she went, and make the best road bed as would suit the machine, and suit the railroad, then we would go in, as we would say, eighty thousand yards; we would straighten up our lines with probably eight or ten thousand yards, and take the best material and slip a dinkey and cars up along.

Q. You still don't answer the question. You said you didn't want to go back to Station 100 and 122 at that time and raise the grade?

A. No, I didn't.

Q. But you wanted to go ahead?

A. Sure.

Q. And go back in dry weather; that is, do the work in dry weather?

A. Yes.

Q. Now, suppose Mr. Norris had not insisted, as you say he did, how would you raise this road bed, with steam shovel or by hand?

A. Which road bed?

Q. At 100 to 122? That is what you have been talking about.

A. We would have left the road bed the way it was; we could get over with the locomotive and equipment ahead, and this track was out to say, Station 120; this track was out Station about 200. Meant a little lack where we moved the shovel back to catch the track; I don't know just how far they had moved back.

Q. You don't seem to understand.

A. Yes, I do.

Q. Answer the question, then.

A. Give it to me again and make sure.

Q. You didn't want to go back to Station—

A. No, I didn't want to.

Q. All right; I understand you there. Maybe I can shorten it this way: You say you intended when you did go back in dry weather to do that work, raise that grade by hand?

A. Do the finish up work when the machine was on the way out of there.

Q. That is, you intended to do by hand, if I understand right?

A. No, no, not by hand.

Q. How did you intend to do it?

A. Well, the track was good enough to go over

that. We intended to take a little material where the shovel was at that time; that was the hardest rock on the job.

Q. You say you would leave that material there until the following spring and go up and get it?

A. No, the place where the shovel set at the time when he ordered the move back, that is the best material on the entire line to hold road bed with. The bad spot was down at Station 100 to 120, the good material was up about Station 230. I wanted to take some of that material where the machine was, and load it and run back there, and told him at the time that I didn't figure any credits as to percentage for overhaul on it; was a long haul; a little of that gone back there would leave the track in shape so we could always get across and get to the front. We hauled nothing more down there, but if we didn't put there, was enough poles and everything, we could get across; we were going every night back to and fro. Was unnecessary work to go and open up a pit at that time of the year. In fact to save a month where we were then was worth three months ahead; that is, we would gain that time if we got the machine up ahead.

Q. You evidently don't understand my question yet; if you had taken some of that material from 230 like you wanted to.

A. I didn't take any.

Q. If Mr. Norris let you and you had taken some of it, and temporarily fixed that road bed, you intend-

ed at some future time to go back and conclude that, didn't you?

A. Yes, sir.

Q. That is what I was talking about. When you would have come back in the next spring you would get dry weather. How would you—where would you have gotten your material? You made a statement on that point.

A. Why, we would have taken material, the most suitable material and the shortest haul to that spot.

Q. What with? What would you have used?

A. Steam shovel.

Q. Would have used steam shovel in any case?

A. Yes, because we had the track down then, standard gauge track, probably if had been left there would have been raised from the ballast pit.

Q. You don't understand me yet. Would you have done it by hand?

A. No, we done the grade in the first place by hand.

Q. Now, in spite of this borrow pit with two feet of water you told the Court about—

A. There was six feet of water.

Q. All right.—Onerous conditions under which you did work, you say now, as you said then, that the Whitney Company was getting that work done about as cheaply as anybody could get the road bed built for?

A. The way the weather was, and at that time of the year. Nobody loafing on the job, and all old-

timers there doing the work; I don't know how you would beat it; that's the idea; I don't want it understood was anything in the management; fine and dandy.

Q. How do you claim that requiring you to go back—I assume that to be true by this question—and making you do this work under the conditions such as you relate to the Court—how do you claim that that damaged you? That is, how do you come into court and ask moneys from the defendant by reason of that? You got paid for all you did, didn't you?

A. No, I did not. I went up there and built the line and we haven't got one cent profit; we have the books here.

Q. You were reimbursed for any outlay that you made in going up there and digging out that six feet, weren't you?

A. We were paid costs plus 5% for what we did.

Q. The more it cost the more you got?

A. Yes, a 5% cost plus.

COURT: Were your payments made on unit of material moved?

A. No, on the payroll.

COURT: You got from Whitney and Company return for the money you expended, do you mean?

A. Yes, they paid us 5% on roll and supplies; that is what the contract called for.

COURT: The fact that you had to have sixty men in place of twenty-five didn't affect you in any way, otherwise than you got 5% on overhead?

A. I was working on base cost; if I built the line

for a certain price in a certain time was to get a larger percentage.

Q. Not within a certain time?

A. I signed for January, 1920, in the contract.

Mr. Freed: We will bring that out; I don't think that counsel would contend that time—

Mr. Dobson: We were required to do this work by a certain time.

COURT: That is the contract specified that the plaintiff should do the work in not to exceed a certain time?

Mr. Dobson: That is the situation.

Witness Excused.

A. FObERT, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Dobson:

Q. Your full name is what?

A. Alec Fobert.

Q. What business are you now engaged in?

A. At the present time?

Q. Yes, at the present time.

A. Farming.

Q. Where do you live?

A. Hubbard, Oregon.

Q. I will ask you whether or not you are at this time or ever have been connected with the Rajotte-Winters Company, a corporation?

A. Yes, sir.

Q. And are you now, or were you ever an officer of that corporation?

A. Yes, sir.

Q. I will ask you whether or not you were an officer of that corporation during the months of June, July and August, 1919?

A. Yes, sir.

Q. Are you still an officer of that corporation?

A. No, sir.

Q. Now, do you know the defendant of this case or its officers, the Whitney Company?

A. Some of them, not all of them.

Q. Do you know Mr. Norris?

A. Yes.

Q. Do you know Mr. Cole?

A. Yes.

Q. I will ask you whether or not you had anything to do with the making of this contract that is in controversy in this suit?

A. What do you mean by that?

Q. Were you present at any conversation before the contract was signed?

A. No, sir.

Q. Did you have anything to do with it?

A. No, sir.

Q. I will ask you whether or not you were on this work at any time?

A. I was part of the time.

Q. Were you over the work before the contract was signed?

A. Not just when they got the contract.

COURT: What is that?

A. I went down there after we got the contract.

Q. You were there after the contract was signed. I wish you would just relate to the Court in your own way the reason why you went upon this work and the circumstances and who you met when you went down there and what you went for.

A. I went down there with Mr. Glavin and Mr. Crook to meet Mr. Cole to line up, start on the work.

COURT: What time was that?

Q. Do you remember about the time?

A. I couldn't give you.

Q. The 24th of June the contract was signed.

A. Well, it was shortly after.

Q. Just relate to the Court why you went down there, what you did, and who went?

A. I went down with Mr. Glavin to meet Mr. Cole and give him the line-up on the start of the work. Went down there and met Mr. Cole and we went over the first part of that work.

Q. Mr. Fobert, just take the profile at this time and indicate to the Court what part of the work you went over with Mr. Cole?

A. Yes, sir. Station about 26 we started about Station—where they dumped—

COURT: What number?

A. Station 26.

Q. Just a minute. Indicate the station to the Court. Can you read and write?

A. Yes, sir.

Q. Can you read the figures on that profile?

A. Yes, sir.

Q. Well, can't you refer to the figures on the profile; you can refer to the stations as indicated on the profile?

A. Yes, sir.

COURT: You went over from 26 how far?

A. We went over from 26 to the Southern Pacific track where the stations start out.

Q. Is that the only part of the work you went over at that time?

A. Then we go in Mr. Cole's machine and he took us over this work here, over to the cemetery with the machine, we drove right up to cemetery cut with the machine, Station 160 with the car.

Q. Did Mr. Glavin go with you?

A. Mr. Glavin and Mr. Crook.

Q. I wish you would tell the Court just why you and Mr. Glavin made that trip in that way?

A. To get the line-up right and get the work started as quick as possible. We went over this cut here and we decided to put the shovel here. That was the first piece of work for shovel, pick this cut and take the shovel on through ahead. Get across the river before the water raised, so we would be able to cross.

Q. Was there any other reason why you wanted to get across that river besides the water raising in this particular stream, was there any other reason?

A. Yes, we wanted to get up there and wanted to get the benefit of dry weather, do more work.

Q. Was that discussed with Mr. Cole at the time?

A. Yes, sir.

Q. Now, did Mr. Cole say anything about using the steam shovel this side of the cut at that time?

A. Not a word.

Q. Go ahead and state what you did.

A. Then we got into this car and we drove up to Station 230, along there, 232, along there, and shows on the way over; shows the right of way along the machine; in places you could see and in places you couldn't, in the timber, and come to Station 232 we crossed the grade; bridge was to go across the railroad; railroad right there; then we went on onto the opposite side of the river, and we could see along from the machine part of the road between the river and the hill, and we went up about, I judge, a mile with the machine, then we walked up the river a little further and crossed the cable bridge, an old foot bridge, an old cable bridge, and went and hit the grade just the other side of Clear Creek Station here.

Q. Station 240?

A. Forty or forty-two, somewhere along there; hit the station along there, and went down Clear Creek from this cut down there, and then we come back and went up as far as Sam Down's.

Q. That is about Station—

A. That is following the center.

Q. That is about Station 380?

A. 380, yes, sir, and we looked the grade over, there was a side hill. Where we first started was

one thorough cut, just a short way, and hit the side hill, more side hill there in the line I went over, and then we hit a flat, then hit a little side hill, then Sam Down's—100 feet, Sam Down's.

Q. While up there, did you have any discussion with Mr. Cole as to the manner in which that work was to be done?

A. Not very much.

Q. What was the purpose of gong up there?

A. To look at the work; he was going to show us the work for an idea of right of way; that is, the main part to get the right of way cleared. Couldn't grade without having the right of way cleared.

Q. In examining the first part of this line, beginning with Station 17, what was the nature of the work to be done in that stretch there, that part of the work from Station 154 back to the beginning of the line? That includes all that part west of the S. P. track. What was the character of that work?

A. From 154?

Q. Back this way?

A. We was going to do that with a team scraper.

Q. Now, Mr. Fobert, did you and Mr. Cole actually discuss the manner in which that work was to be done?

A. Yes, that is what I went down there for.

Q. What was said by you or by him?

A. We all agreed together it was the best way to do that work there, light work and natural team work.

Q. That included work west of the track and work east of the track?

A. That included all that light work.

Q. Who suggested that the steam shovel plant should be placed at cemetery cut or about Station 154?

A. I suggested, and they all agreed to it.

Q. Did you tell that to Mr. Cole?

A. Told Mr. Cole.

Q. Did he make any objection to that?

A. No.

Q. Now, did Mr. Cole at this time say anything about using the steam shovel back at Station 17?

A. No, sir.

Q. When did that discussion first come up?

A. About moving the shovel down there to 17?

Q. Yes.

A. I wasn't there on the job.

Q. So you know nothing about that?

A. Mr. Glavin had charge of the job.

Q. Mr. Fobert, I would like to have you give the Court, if you can, more in detail, the conversation that took place between you and Mr. Cole and Mr. Glavin. You were all there together, I understand.

A. We were all there together.

Q. Concerning the plans for beginning this work and for carrying it on, and the time you expected to do it in?

A. We discussed the first work; they would get the shovel placed in the right place, and do all the light work with the team. Was going to do the

cemetery cut at 154 with steam shovel. Was a long fill ahead of that, then would shoot the shovel across the river before high water; that was agreed.

Q. Right there, an important question. Did you, or did you not, discuss with Mr. Cole at that time any other reasons for getting this shovel across this river?

A. To get the work done in the time it had to be done.

Q. Why, was there any particular reason why a rush about it?

A. Rush?

Q. Yes.

A. We didn't have time to loaf around, take our time, we had to push the work through to make it, had to be in a hurry with it.

Q. Did the possible water conditions you might encounter have anything to do with it?

A. Why, what do you mean?

Q. Wet or bad weather. Was anything said about encountering wet weather up there?

Mr. Freed: A leading question.

A. To get across the river, or after we got across?

COURT: Why they were going to take the steam shovel across the river?

A. Was going to ford the river.

Q. Why were you in a hurry to do that?

A. When it got to raining, and the river rose you couldn't do it.

COURT: You wanted to get across before the river raised?

A. Yes, was just a little bit of water, wasn't over two feet in the deepest part, bottom solid gravel, nice and level.

Q. That was the only discussion you had with Mr. Cole about that?

A. Yes, sir.

Q. How long were you up there?

A. Just about that time.

COURT: How long?

A. Just that afternoon at that time.

COURT: How long did you stay there on the work? Did you stay there at all?

A. No, didn't anybody stay there then; went up and got the outfit shipped down there.

COURT: Did you stay there after the work commenced?

A. No.

Q. Just simply went up to make plans for location. Did you have any discussion with Mr. Cole at this time as to the character of the equipment that you were to use on the work?

A. Mr. Crook done that.

Q. I mean, did you have any discussion yourself with Mr. Cole?

A. No.

Q. You didn't talk with him as to the kind of equipment you would have or the force of men?

A. That was all arranged, all to be arranged through Mr. Rajotte.

Q. That is, equipment and so forth?

A. Equipment.

Q. Just a matter of location of that equipment that you went up there for?

A. Yes, sir.

CROSS EXAMINATION

Questions by Mr. Freed:

You were the only official of the Rajotte-Fobert-Winters Company, as it was then, that was in on this conversation. That is, Mr. Glavin, and Mr. Crook were under you, weren't they?

A. Yes, sir.

Q. They were your subordinates?

A. Yes, sir.

Q. And you were there for the purpose of arranging with Mr. Cole, the engineer of the Whitney Company—

A. Yes, sir.

Q. As to how the work should progress?

A. Not that.

Q. As to what?

A. To start on.

Q. How should it be started—the plans?

A. To get it started, we brought camps afterwards; started the work first.

Q. Was Station 154 beyond the river? You said you wanted to get across the river?

A. The river is about a mile further.

Q. You wanted to start at 154 so you could work up and cross the river before the river rose too high to ford it?

A. Yes.

Q. And as far as you know, that was your only reason for requesting that location?

A. Yes, sir, because that had to be done to make time.

Mr. Dobson: I want to make this statement now. Later on in the case to take this work in an orderly way and I want to call this witness back to connect up certain things.

Witness Excused.

Whereupon proceedings herein were adjourned until ten o'clock tomorrow morning.

Thursday, October 25, 1923, 10 A. M.

MATT GLAVIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows.

DIRECT EXAMINATION

Questions by Mr. Dobson:

Q. Where do you live, Mr. Glavin?

A. At Lyle, Washington, at present.

Q. What is your business?

A. At present subcontractor.

Q. Are you in the employ of the Rajotte-Winters Company, the plaintiff in this case?

A. I have the subcontract under Grant-Smith Company on that same work up there.

Q. Were you ever in the employ of the Rajotte-Winters Company?

A. Yes, sir.

Q. Were you in their employ during the period

they were engaged in the construction of this road bed for the defendant?

A. Part of the time, yes, sir.

Q. Were you in their employ at the time of this contract?

A. Yes, sir.

Q. I will ask you to state whether or not you were in the courtroom yesterday?

A. Yes, sir.

Q. And you heard the testimony of Mr. Fobert and Mr. Rajotte?

A. Yes, sir.

Q. State whether or not you accompanied Mr. Fobert at the time he first went upon the work for the purpose of making plans and preparation for proceeding with it and carrying it on?

A. I did.

Q. I wish you would state to the court in substance just what was done at that time.

A. We went up over the line.

COURT: Who do you mean by "we"?

A. Mr. Fobert, Mr. Cole, Mr. Crooks and myself went up over the line at that time getting ready to put camps. That was the reason I went along, to look up and get camp sites. I was going to take charge of the work. I don't remember whether a contract was signed or not, but we were making preparations for starting our camps. We picked out the camp sites for the men up over the line, and made plans where we would start our steam shovel, build our camps, etc.

Q. Just about what station on the line had you planned to make your first camp and establish the steam shovel?

A. We planned on building camp about 148 and starting our steam shovel at Cemetery cut, approximately Station 154, I think.

Q. Go ahead and state what else was done at that time if anything?

A. Mr. Cole took us over the line from Idaville up to past Sam Down's Creek.

Q. Now, Mr. Glavin, state just what was the reason or purpose of Mr. Cole taking you up the line beyond that point, beyond the creek?

A. We were looking over the work. Mr. Crooks, Mr. Fobert and myself.

Q. What was the idea of looking over the work at that time?

A. Getting general ideas how to handle the work, looking at the class of material.

Q. Was there a discussion between you and Mr. Cole and Mr. Fobert or a conversation in Mr. Cole's presence wherein you discussed the manner in which you expected to work at the upper end of the line?

A. Yes, we discussed it.

Q. Will you just tell the court in substance what that was?

A. Mr. Cole and Mr. Fobert and Mr. Crooks discussed it. Mr. Cole's idea was to get in there as soon as we possibly could with a steam shovel plant; get up over the line as fast as we could on account of the weather we would probably hit along in the fall, get

over Kilches River just as soon as possible. That was the impression Mr. Cole wanted to leave; we could get started at Cemetery cut, Station 154.

Q. What was the specific reason for wanting to go on; that is, get beyond Cemetery Cut?

A. Wanted to get the line built as quickly as possible.

Q. Was there any other reason or condition to their mind?

A. Of course we couldn't cross the river unless we got started.

Q. Was that the only reason?

A. That was the main reason. We had to get up there that part of the work, and get over the river, and up to the other part of the work in the fall and finish it as soon as we possibly could.

Q. Did the season have anything to do with your rushing the work up there?

A. Makes quite a lot of difference.

Q. Wasn't that one of the reasons discussed?

A. The reason—the weather condition to get up there before we hit the bad part of the weather; makes a great difference in running.

Q. Mr. Glavin, was there anything discussed as to the manner in which that work was to be done up there?

A. Yes, sir.

Q. What was that?

A. The general outline, we were to get across the river and go through with the steam shovel, and cast most of the material on the side work.

Q. We want to be sure the court understands the operation of casting. Will you please tell the court what that means?

A. Your Honor, here is the cut like that, and the shovel would come along, the grade runs along maybe probably half way through the cut; the other half of the grade like that; and come along and cast. The steam shovel to make this, to save hauling in the dinky cars, or anything like that. That expedites that part of the work. That was side hill work up through there. Some places the center line comes along like that, but that was the general idea at that time, we could go through and do the work that way, just cast over and make the other side fill, and save hauling. Of course some clear cut; would have to haul clear cut. That was the idea, we were to cast that material; could cast it and get along.

Q. In that operation what would constitute a crew for the operation of the steam shovel, in a casting operation?

A. Well, you would have to have about six or eight pit men, and then your top man for water and hauling the coal; run probably eighty or ninety dollars a day; a hundred dollars a day, approximately.

Q. Suppose that was what you call a thorough cut. Suppose you had to make a thorough cut and go through there and not cast the material over the side. What would your shovel crew consist of?

A. The shovel crew consisted the same number, but have to grade for your dinky tracks, and make preparation for hauling material. Sometimes neces-

sary to build timber trestles, temporary trestles to dump off.

Q. That would mean have to lay a special track to operate your dinky engines.

A. Yes, sir.

Q. And you had in connection with that a number of cars?

A. We had eighteen cars.

Q. Wouldn't you have to have additional men to operate these cars?

A. Yes, sir.

Q. About how many?

A. That depends somewhat on the material. If wet and bad weather, it takes additional men. If a high dump it makes a little difference. If it is a high dump, you can use less men, of course; if low, and the class of material makes a lot of difference, softer kind of material, that is.

Q. Now, in that particular country, the material is substantially the same?

A. Practically.

Q. The same general character?

A. Just about the same. Some of it was good material, and in wet weather some a little sticky, and different class.

Q. Mr. Glavin, are you in position to say at this time what the additional cost would be in the handling of these cuts up there as a hauling proposition, compared with the original plan of casting the material?

A. No, I don't know. Of course that depends on how far it is hauled.

Q. The point I want to get at, Mr. Glavin, if possible, at this time for you to give the court any accurate figures on that proposition. If it isn't—

A. I couldn't exactly give them any accurate figures on that.

Q. I am referring to this work generally?

A. No, sir, I could not.

Q. Could you give the court some idea as to the approximate difference in cost, the percentage based upon your experience?

A. Well, some—of course that altogether depends on the cuts too. Some probably run thirty per cent, some forty per cent additional cost, some less than that.

Q. What I want the court to know is this—you were on that work?

A. Yes.

Q. And you were there when they were making a good many of these cuts and fills?

A. Yes.

Q. And you had some idea of the difficulties, etc., they encountered there in making these cuts, didn't you?

A. Yes, sir.

Q. And you had some idea as to the difference in cost in building that road bed if you cast the material over the side, as compared with having to cut through the center and make thorough cuts, as we term it?

A. Of course some of those cuts are not thorough cuts.

Q. Can you refer to the profile, Mr. Glavin?

A. Yes, sir.

Q. Now, to get at this matter a little more definitely, I will ask you to state how far did you go up on this work; that is to say—

COURT: You mean with Cole before they began the work?

Q. Yes, just fix that point first.

A. Right in here.

Q. About what station?

A. About Station 390.

Q. Now, were these cuts that you would have to make in the construction of the road bed, were most of them above that point?

A. A lot of cuts above that, and quite a number down through below.

COURT: Are those cuts you speak of shown on this profile?

A. Yes, sir.

Q. Just point out to the court where they are, in getting at the Cemetery cut there.

A. (Showing profile) There is a cut. That is the Cemetery cut; a thorough cut right there. We first figured to put the steam shovel in here and haul all that ahead to this fill, is a fill here, to borrow fill; we got a little extra material and made a fill instead of making a borrow on the side, side borrow, one thing that increases overhaul sometimes on these cuts; that was the first cut. We figured on doing

it with our shovel right there. We had a camp right in here, Station 148. In these little woods right off the side. This is a side cut. These are side cuts, we figured on casting this over the side, running along, coming in here. Sometimes it takes a little more material. This is side work, all figured side work.

COURT: Did you actually cast the material?

A. No, sir, we hauled most of that. Cut here and hauled back in this fill, and hauled some ahead. Changed it from the way we originally planned doing it.

COURT: Where did you expect to get the material to make these fills back here?

A. Made a borrow pit right here for this particular fill.

COURT: Why didn't you follow out that plan while doing the work?

A. This particular piece right here was first figured in team work. Didn't have enough—

Q. We will get this a little later. I want to give some general idea along the line. While we have the map open here, can you—first, I will ask you this: were you there all of the time the plant was engaged in this work?

A. No, sir.

Q. And how far had they progressed with this work at the time you left up there?

A. About Station 448.

COURT: That would be four miles?

A. No, sir; that is on Mile 7.

Q. Between that Station 154, and Station 448,

I wish you would just take that profile and generally point out, or state, rather at what particular points you made thorough cuts which were originally planned to be a casting proposition. We will take them up in detail a little later on.

A. I can't just remember offhand about these cuts.

Q. Just state all that you can remember at this time?

A. Quite a long time ago. We figured on casting all of this through here. I think one or two of these cuts.

COURT: Between what stations are you talking about?

A. Between Station 280 and Station approximately about 310, from really about Station 260. We figured on casting them—mostly side work.

Q. Now, is there anything on the profile——

A. There are two or three little thorough cuts in there that are just like all the thorough cuts.

Q. What station would that be?

A. I think between 300 and 310. I am not absolutely sure about that, there was a thorough cut. This was figured on; thorough cut here from 340 to 380, that is a thorough cut.

MR. FREED: What does he mean by thorough cut?

MR. DOBSON: Cutting through and not casting the material on the side.

Mr. FREED: You didn't intend to cast at these points?

A. No, sir; from either one. From there on up to Station 410 was side work, could have cast that. Everything there above that, I wasn't on that work, didn't familiarize myself with it.

Q. Now, Mr. Glavin, did you have any conversation with either Mr. Cole or Mr. Norris, his successor, as to any changes that were made in the work, requiring that to be changed from a cast proposition to a hauling proposition?

A. When Mr. Norris came he changed the line from about 273. That is the right of way clearing. We had to clear additional right of way up through there, and necessitated change of the line through there, and a little—

COURT: From where?

A. From about 273 to 375, approximately; we had to do additional clearing along the side.

Q. That would be a distance of about how much in miles? Would be approximately a mile?

A. Yes, over a mile.

Q. Now, Mr. Glavin, reverting back to the beginning of this work, where did you actually begin your construction work?

A. Began our construction work clearing at about Station 148 for our camp, and building our camp, and started our clearing up ahead at Station 154, where we figured on starting; was the first work on the job.

Q. I will ask you first what was your duty and position up there at the time?

A. Supposed to be superintendent on the job.

Q. You were there immediately following Mr. Fobert's trip up there?

A. Yes, sir; Mr. Fobert was with us the first time we made the plan for starting work.

Q. When he left, did you take charge of the work?

A. Yes, sir.

Q. Now, for the purpose of establishing the fact as to what your plans in detail were, for carrying on this work, just where did you plan to place your shovel plant?

A. We planned to start at Station 154, at the Cemetery Cut, and move up from Idaville when the shovel came in, and start east.

Q. In reaching that conclusion, whom did you confer with, or consult with?

A. Consulted with Mr. Fobert, Mr. Cole and Mr. Rajotte.

Q. Now, did you when you started your shoveling operation, did you place you shovel at the station 154?

A. No.

Q. Where was that shovel placed?

A. Started about Station 17 west, when unloaded at the Southern Pacific tracks.

Q. In order to start at that point, what change did it make in your plans?

A. Made us move west of the S. P. tracks, and work a month there instead of going east.

Q. What did that mean with respect with your going ahead with that work at this particular time?

A. Meant a delay of going on head work, of probably over a month, and hitting bad weather, you see, delayed us a little more.

Q. Was there any discussion about that between you and Mr. Cole at that time?

A. Our plans and the orders from the contractors, Mr. Cole's station was at 154, and just before the shovel arrived Mr. Cole figured we should go down in the meadow and make a borrow down at station approximately 17 west. I said to him something about this, and he said: "I am chief engineer on this job, and you go just where I send you."

Q. Can you fix the time when the steam shovel plant was moved into this borrow pit at Station 17 west?

A. The first week in August, 1919.

Q. Have you any record that we can refer to at this time which will fix that date definitely?

A. Yes, our daily reports, the package over there, our payrolls and labor for the month. Mr. Martin can find that.

MR. DOBSON: Will you find that, Mr. Martin? I would like to have that in the record.

MR. MARTIN: I didn't hear the question.

A. The distribution for August, 1919, August 5, I think.

MR. FREED: We will furnish the date, if you want it.

A. I think it was the 5th of August.

MR. FREED: I think it was.

A. First week in August.

Q. Mr. Glavin, what additional work, just state generally, was incurred by having to move the steam shovel plant back to Station 17 at this time?

A. Well, we moved down over the flat; approximately eight or nine hundred dollars; building temporary trestle for dumping, laying a dinky track.

Q. Just what did that—how much dinky track did you lay there?

A. We laid about—had to lay seventeen—nineteen hundred feet, a little over two thousand feet; to get across the S. P. track you have to lay probably over two thousand feet of dinky track, and haul some material over seventeen or eighteen hundred feet.

Q. Now, what other items and additional expense do you recall that you incurred by that move?

A. Additional expense of overhaul on the material which the side borrow would not indicate; as shown by the profile would be just side borrow.

Q. What does the profile show as to that?

A. Shows a side borrow of 10,320 yards, just along the side of the work.

Q. You know what the actual overhaul was at that point?

A. Figured approximately, 70,000 yards, first overhaul up there.

Q. How much a yard would that be?

A. Three cents a yard.

Q. That amounted to about how much?

A. \$2100; amounted to that much overhaul. That increased the overhaul by doing steam shovel work instead of team work in that particular instance.

Q. In other words, your original plan, as indicated by this profile, was to do this work at that point with the team, what you call hand and team work?

A. Yes, sir.

Q. Do you think the entire additional expense incurred there——

A. Building temporary trestles, that amounted to approximately \$500.

Q. What was the necessity of building temporary trestles?

A. Had to fill it from six to seven feet, and run your dump cars over and dump them, to put the fill in.

Q. I will ask you if you have made some calculations as to the increased cost of the operations there?

A. Yes, sir.

Q. Showing what they total?

A. Yes, I made a few of those on paper.

Q. Is this the result of your calculation?

A. Yes, sir.

Q. Now, I will ask you whether or not you claim these are absolutely accurate? ,

A. No, sir; they were taken off the daily reports and it is approximate. They may have more than

that. There were items the Whitney Company carried, for instance, trestle timber, etc. I couldn't give exactly what it cost. The Whitney Company furnished the timber in this sort of work; they also took care of the fuel we burned in our steam shovel, etc., and I couldn't give it accurately.

Q. So you could only get the items——

A. Our labor; our labor cost, our payrolls, really.

Q. Just explain to the Court where you got the figures?

A. Just took these off our daily reports, of the time the shovel was on there.

Q. What do your daily reports show? Do they show distribution of some kind?

A. Show distribution of labor performed each day, of all the men on our work, and the sort of work doing. For instance, if the men were building a trestle, show them building a trestle, or dinky track or grading. Distribution kept of all that.

Q. What was the total of that?

A. Shows about \$8,000. That is what it cost additional. That is what it cost to go down there.

Q. To make it clear to the Court, what was the expense that was incurred that you didn't contemplate at the time you started in on this work?

A. Your Honor, the team work, if we had to do it by teams, would not be so much for going down the last month, and that is what it cost us going down there. The work——

Q. That isn't the point. That was expended on

character of work there that you had not contemplated?

A. Yes, sir; of course if we had taken out with team——

Q. Of course you had to make the grade?

A. Yes, we figured on doing it with team work.

Q. Wasn't there some additional work in the nature of filling?

A. We filled in probably a thousand yards extra where there was a change on the Y, and where they were figuring on putting in a warehouse. Filled around so as not to get in the foundation.

Q. What additional work did that involve?

A. Involved short trains there to carry it out; the way the engineer had put this, we had to use our short trains, and dump two or three cars at a time to make the dump conform with the measurement of the building, so as not to get any down in the foundation, where going to dig the foundation. That was extra labor, and slow operation—slowed up the operation of dumping.

Q. Was any additional clearing or grubbing done on that account?

A. Of course some additional clearing and grubbing for the warehouse there. Some for the line anyway, was additional clearing and grubbing; in fact, Mr. Cole let a contract for the clearing and grubbing.

Q. Did you encounter any delays by reason of the clearing and grubbing?

A. We encountered delay; the sub-contractors

who were doing this work had a donkey engine that was absolutely no good, and they couldn't clear. Sometimes we had to move our horses down ahead, and help them out.

Q. Did that delay your operations ahead to a great extent?

A. The delay was probably three or four days, and the delay was on the clearing, of course.

Q. That is what I mean.

A. Yes, made a little material difference.

Q. Mr. Glavin, how long were you in this—for how long were you at Station 17? On this additional operation we have just been talking about?

A. Approximately a month.

Q. Are you able to fix the date when you moved out of there?

A. Finished digging there August 30.

Q. How do you get that date?

A. Taking off our daily report showing our distribution.

MR. DOBSON: I think that time is correct.

MR. FREED: We won't have any dispute on the date, I am sure.

Q. Now, then, what did you do? Where did you go?

A. Started moving up ahead, and moved our shovel to a little cut, about Station 148 - 145, in there. About 143 the cut is, that is where we moved next.

Q. When did you start operations at that point?

A. Probably the first or second of September.

Q. In other words, you started operating up there just as soon as you could move the plant to that point?

A. Yes.

Q. That would take a matter of two or three days.

A. Yes, to take the plant across over the grade.

Q. Mr. Glavin, was there any additional work or expense incurred for that operation?

A. No, not in that operation.

Q. And the next cut you moved to was what?

A. Cemetery Cut, Station 154.

Q. Was there any change and additions there?

A. No, sir; we started in there, and I think we started there about September 9.

Q. Do you recall, Mr. Glavin, at about what point you encountered any additional work that was not contemplated at the time when you moved on up the lines?

A. Yes, sir; we had to finish grade at Station 184 to 200, along there, considerable trouble of finishing the grade, on account of grade stakes.

Q. Just explain to the Court what that was.

A. We were operating our shovel there. The instrument man or engineer of the company had given us the grade two or three times. Our shovel checked pretty close to the grade, but when the finishing grade was set, we were off a foot; some places six-tenths of a foot, and we finished that, and they changed again. Changed two or three times there,

took some time to finish that part of the work and was an additional cost.

Q. Who was responsible for that situation?

A. The instrument man at that time was young Mr. Cole, brother to the chief engineer.

Q. Do I understand now that this engineer would go along and set stakes to indicate to what point you should finish the grade?

A. Yes, sir.

Q. And you had finished to that point?

A. Yes, sir.

Q. And after that was done, you would be required to go back?

A. Required to finish that cut on account of the thing not checking.

Q. In other words, would they change the stakes at a subsequent time?

A. They changed those stakes, yes, to make them check out. You see the fellow made some errors, where they made the first place or the second, of course I cannot say, but they were made anyway, and we had to do some extra finishing work there along in October—it was pretty bad weather.

COURT: What station, do you remember?

A. Station 184 to 200, along in there, approximately.

Q. Have you any idea what the additional costs were, as the result of that?

A. Probably \$400, along there.

Q. What was that for?

A. Just for extra work, refinishing, and some-

thing we couldn't help at all; finished to the grade. We first cut it down to the foot; built it up again to make the grade, and then they changed it.

Q. Was there any additional cost with respect to having to haul material in connection with the operation.

A. We hauled some material later in there for ballast, and rock, for rock bed, on account of being a little soft; to take care of it.

Q. Was this ballast proposition a part of your grading contract?

A. No, sir.

Q. Was this additional work, or work you hadn't planned?

A. Really additional work. It was to haul back on standard track; just to pick the track up.

Q. That the Court may understand the situation, the plaintiff in this case had a separate contract for ballast—another contract?

A. Not at that time.

Q. Later on they had a separate contract?

A. Yes.

Q. The point is this: The ballasting material is a different operation, is it not?

A. Yes.

Q. You had nothing to do with that?

A. No, sir.

Q. Now, do you recall any condition which involved extra, additional work at Stations about 249 and 252?

A. Well, we made a borrow pit there and hauled back. Probably an additional cost.

Q. Why was that necessary?

A. When we first went up there, we figured on doing borrow in there, side borrow, with teams.

Q. Does that indicate on the profile that was the character of work to be done?

A. Yes, sir; it is side borrow up there, 6520 yards. We were going to go up there with our teams as soon as we finished down in the flat. Shortly after that, Mr. Cole told me he didn't think the right of way was wide enough to make the borrow on the side, and leave a berm for the fill, so I had to trestle up there. Said they didn't really secure enough right of way.

Q. Will you just explain to the Court what that meant in connection with making a fill? You might consult the profile.

A. We figured on just this side work through a farmer's field, were going to take teams and put it up and make it a team proposition, much of it.

Q. Where does it indicate that was side borrow work?

A. Right here.

Q. How is that indicated on the profile?

A. It shows side borrow from here to here, 6524 yards. We were going to put in teams. Not having enough right of way we had to go in here and establish a borrow pit, and haul this back; made additional overhaul, and caused the building of a temporary trestle and dinky track.

Q. Now, the Court may have some misunder-

standing about the depth? What does that indicate, the depth?

A. About eight feet, approximately seven or eight feet, about an average of six or seven feet.

Q. And was that a feasible operation to make that fill by side borrow as you have indicated there?

A. Yes, would have been all right; very good material.

Q. And I understand the only reason that was not done they didn't have sufficient width in the right of way?

A. That was the idea. Not enough to leave a good berm and take sufficient material.

Q. What are the stations there? Between what stations?

A. The fill is about 238 to 248, approximately.

Q. Now, Mr. Glavin, approximately, what did that operation cost up there? That is, the additional cost as the result of having to do that work in that manner?

A. It would increase the overhaul by making a borrow pit, of course, and making temporary trestle. I don't know just exactly how much it would increase it?

Q. Have you made any estimate?

A. I made a little estimate on it.

Q. Is this the estimate you refer to?

Q. And in making that estimate you referred to these daily distribution books, as you call it?

A. Yes, sir; the cost of the trestle, and the track

laying, etc., and what the additional overhaul would be.

Q. Mr. Glavin, do you recall any other instance where there was additional work encountered?

A. Station 273 was additional clearing. They widened the clearing, when we completed the clearing through in the fall.

Q. Beginning at what station, and ending where?

A. Station 273 to 375.

Q. You were on the work at this time?

A. Yes, sir.

Q. And do you know who did that clearing?

A. Mr. Sweeney did most of the additional clearing. We did the clearing through ourselves.

Q. The original clearing?

A. The original clearing.

Q. What did this additional clearing indicate?

A. They changed the line a little, changed the line, threw it up the hill in some instances, changed it; and of course the clearing had to be changed.

Q. Referring to Stations 384 to 416, approximately, do you recall the work that was done up there, the changes ordered?

A. It was all hand work up through there, done by hand.

Q. Was that done—did you contemplate doing that work in that way?

A. No, sir; we didn't on the start.

Q. I wish you would refer to the profile, and

just tell the Court the character of the work indicated between these stations on the profile.

A. This is little side cuts. We figured on just doing shovel, casting some of it, hauling some of it. Instead of that it was done by hand. That was quite an increase in cost. The labor at that time was expensive and was hard to get a great deal of work out of them. That was done by hand. Afterwards we moved in here.

Q. What was the station?

A. At Station 390. We took a cut out by hand, 387. We afterwards moved the steam shovel in and made a borrow pit there in about the same place. Had we known the borrow was going in there, we could have used the steam shovel in there and taken it all out.

Q. Who directed you to do that?

A. Mr. Fobert, Mr. Rajotte in connection with the Whitney Company, and at that time Mr. Fobert was on the work.

Q. You were superintendent?

A. Yes.

Q. Was that your idea, the work should be done in that manner?

A. No, sir; I wanted the shovel. That is the way we first contemplated doing the work. It is more expensive by hand.

COURT: Who did you say directed the change?

A. My instructions were from Mr. Rajotte and Mr. Fobert. Mr. Fobert was on the work at this time.

They had instructions to get hand men in there and rush the work.

MR. DOBSON: We simply explain the work was done in this manner, but will later show the instructions really came from the defendant.

Q. What I want to get at is the fact concerning the doing of the work in that manner; that is, the increased cost, etc.

A. We figured we could have gone through there probably on a casting proposition, not hand; that is, if we were allowed to cast over the side, instead of that hand work, which is very expensive.

Q. How long did it take you? Have you any records showing how long it took you to do that work through these stations?

A. Yes, sir; we have them.

Q. Is this the memorandum you refer to?

A. Yes, sir.

Q. Now, can you state about when these operations were commenced?

A. One cut was commenced on April 1st to the 12th, Stations 394 to 398.

Q. 394 to 398?

A. Yes, sir.

Q. Just carry right on through there, showing the length of time.

A. Station 399 to 402, from April 7 to 30. Station 399 to 402, from May 1 to 10th, that is the second time. 403 to 407, April 9th to 30th. Station 407 to 411, April 14th to 30th. 407 to 411, May 1st to

31st. That is April and May. 411 to 414, May 1st to May 6th.

Q. Mr. Glavin, suppose you had done that work as you originally contemplated, by the use of the steam shovel plant, how long would it have taken you to go through these cuts?

A. If it had been cast could have gone through, probably, in twenty days; cast the material over.

Q. What was the total time required to do it in the manner done?

A. About two months.

Q. Approximately 60 days?

A. Yes, quite an increase of cost in hand work.

Q. Have you a statement there to give the Court an idea of what the increased cost was?

A. The actual cost of it, on just pay roll labor alone, was about \$11,600. Of course we didn't use the—there was some powder used and horses. We didn't keep any track of that. Figure casting—probably shovel would cost, pay roll \$180 a day. Shovel work and hauling and everything wouldn't be over thirty six hundred.

Q. The difference between these represents the increased cost of having to do this by hand instead of the use of the steam shovel?

A. Yes.

COURT: What was the amount of the extra cost?

A. About \$8,000.

Q. That gives the Court all the items?

A. Yes, sir.

Q. There were other items of expense, I understand, that you have no way of getting at at all?

A. Yes, sir; the horses used on the work, and the powder. Shooting powder; material had to be shot in some instances; couldn't shovel by hand. Of course the powder was furnished by the Whitney Company.

Q. Glavin, you heard Mr. Rajotte's testimony yesterday in connection with the move back from part of this work?

A. Yes.

Q. And that I believe was between stations 100 and 125, or thereabouts?

A. Moved back from station about 231.

Q. That is where the shovel was at that time? I am referring now to that instance. About what station did they move back to, as a matter of fact?

A. They moved back to station approximate eight west.

Q. That was the steam shovel moved back at that point?

A. Yes, sir.

Q. Were you present at the time Mr. Rajotte had his conversation with Mr. Norris about that matter?

A. I was present when the shovel was down there, and heard the conversation, when they had the shovel down in the pit.

Q. Did you hear any conversation between Mr. Norris and Mr. Rajotte prior to moving the shovel?

A. No, sir; I did not.

Q. You were not there at that time?

A. No, sir.

Q. You recall, however, the instance of moving the shovel back?

A. Yes, sir.

Q. Will you just tell the Court in substance what was done?

A. We were digging at station 231 and 233 at the time. Digging rock down; at station 100 to approximately 125 the track was just laid through on the ground, practically on the ground, and was under water, and he wanted it picked up and additional yardage put in for side track there, and work for warehouse and machine shop.

Q. Was this sidetrack, is that shown on your profile?

A. No, sir.

Q. Machine shop site, was that shown on your profile?

A. No, sir; not machine shop.

Q. Right at that point I will ask you to state whether or not you ever saw a map of any kind or blue print of any kind at the time you started upon this work, which indicated that this sidetrack was to be built?

A. I never saw a map. We had a profile when we went over the work. I never had any map, never saw a map.

Q. I will ask you to state whether or not this blue print which I have, Plaintiff's Exhibit 1, is the only map or blue print or profile, or whatever you

choose to call it, that you had at the time you took charge of this work?

A. Yes, sir; the same profile.

Q. And that was to be used by you in carrying on the operation up there?

A. Yes, sir; Mr. Cole handed us this profile.

Q. And you are positive he gave you no other map or blue prints of any kind?

A. No, sir; never saw any other map on the job.

Q. Now, Mr. Glavin, just what did you have to do to make this fill between stations? What were the stations, by the way, that you made this additional fill?

A. About station 107 to 126, along in there, approximately.

Q. And just about what stations did you have to make this additional fill for the sidetrack?

A. Those are the stations.

Q. Those are the stations?

A. Yes, sir.

Q. That is, referring to that part of the grade which you said was under water and had to be raised up, what station was that?

A. That was along—was under water from 112 to 122, along in there, just approximately.

Q. And I will ask you to state whether or not immediately prior to the time you made this fill you were using this road bed for any purpose?

A. At the time we moved back we had the track over that. We used standard track hauling the stuff ahead.

Q. Did you use that road bed largely?

A. Nearly every day had an engine over it.

Q. Was there any real necessity for raising that grade at that particular time?

A. Well, it was a bad track, and under water, of course.

Q. The point I want to make, Mr. Glavin, could that work have been deferred until some later day?

A. It could have, of course.

Q. Now, in order to do this operation, just what did you have to do? What work was encountered?

A. We moved our steam shovel back, and started a borrow pit at station 8 west.

Q. Did you have to open up this borrow pit, or was there one there at this point?

A. No, sir; we opened up a new borrow pit. That was along in December, and very wet rainy weather, and of course the surface water would run in our pit after we started; were digging in cement gravel and of course the water couldn't run out of it, and our pit had a lot of water in it.

Q. What way did it interfere with the operation?

A. We took this material, very wet material—cold and freezing weather, and of course when we hauled it the top would freeze in the cars some time, and used much force to clean the cars each time and pick it out; and then raising the track to keep the track up. Of course the track went down as fast as we raised it almost, on account of the material being so wet.

Q. As I understand, if you had done this work at the season when you could have handled dry material, a lot of this additional work would have been eliminated. Is that true?

A. Yes, sir.

Q. Do you remember ever having had any discussion with Mr. Norris about that?

A. Yes, sir; I spoke to Mr. Norris when we moved down there about the cost, and getting in bad weather down there. It would be expensive because of not a very suitable borrow pit.

Q. Were you there on this operation all the time?

A. Yes, sir; at that time was there all the time.

Q. Can you state now about how long this additional work was, how much time it required?

A. We moved down the first week in December, and were there until the middle of January?

Q. And it was about how long, approximately?

A. About 33 or 34 days, probably 35 days.

Q. Have you any estimate?

A. Yes, sir; I dug up estimate, yes.

Q. As to the additional expense, or rather, the expense incurred by this operation at this time?

A. Yes, sir.

Q. Is that it?

A. Yes, sir; those are the items.

Q. What is the total of that?

A. Total, \$9,704.95.

Q. And you arrived at that how?

A. Took our daily reports and took the distribu-

tion of each day for the time we were in there, and the work being done.

Q. And does that include all the cost of that operation?

A. Of course the engines—we were using standard engines and cars, and those belonged to the Whitney Company, but of course at that time we didn't have our own dinky, and were using their cars and standard track.

Q. Is there any other item of expense?

A. I think that is probably all at that time. Of course, expenses we didn't have any check on.

Q. Now, Mr. Glavin, I will ask you to state whether or not you had any means or method at the time of carrying on these operations of determining as you moved from station to station, or from mile to mile upon the work—determining what the actual cost of the work as a whole was?

A. No, sir; I had no way of determining that exactly.

Q. And why not?

A. We never got an estimate by the month at any time out on the job. We couldn't figure what it cost if we moved it any time. I never saw an estimate while I was there, so I couldn't tell what the yardage there comes to.

Q. In other words, you were never furnished an estimate from month to month as you moved along?

A. No, sir; never saw an estimate on the job.

Q. Never furnished an estimate as you moved

along, as to work ahead you were going to be required to do?

A. No, sir, shown the profile.

Q. That is the only thing you had?

A. Yes, sir.

Q. Was the profile. Now, Mr. Glavin, you know from your observation at the time you were on this work there, that there were a number of changes made in the line?

A. Yes, sir.

Q. And that involved extra and additional work?

A. Yes, sir.

Q. I would ask you to state whether or not it would have been possible for you, in view of the fact that you were given no estimate to have calculated accurately, or with a reasonable degree of certainty the increased cost of your operation by reason of these many changes?

A. No, I couldn't—actual cost.

CROSS EXAMINATION

Questions by Mr. Freed:

Q. Mr. Glavin, how long had you been with the Rajotte-Winters Company, or Rajotte, Fobert, Winters Company at the time this work was done?

A. Just started with them on this job.

Q. What were you doing just previous to that time?

A. With the A. Guthrie & Company for ten years, contracting engineers.

Q. What was your position with Guthrie & Company?

A. Superintendent of construction for a little over eight years with them.

Q. Is that the company that Mr. Nat McDougall is connected with?

A. Yes, sir; here in the city.

Q. What was your position?

A. I was superintendent of construction from 1910 to 1919.

Q. That is to say, you occupied the same position with them that you occupied with the Rajotte, Winters, Fobert Company on this job?

A. Yes, sir.

Q. Where were you? You worked in this vicinity at this time?

A. Worked in this vicinity and Canada and through the northwest. Four years in Canada during that time.

Q. Did you ever occupy the position, or have the job of timekeeper for Guthrie & Company?

A. Not since 1909.

Q. From 1909 on you were superintendent for them?

A. Yes, sir; on steam shovel work practically all the time.

Q. That is, you had the same duties that you had in this Rajotte-Winters Company?

A. Yes, sir; different sorts of work.

Q. Now, Mr. Glavin, you said a good many times in your answers to Mr. Dobson, that you expected,

or that you planned, or intended to do a certain part of the work a certain way. How did you arrive at these expectations and intentions?

A. When the work was first planned out, Mr. Rajotte, Mr. Fobert and Mr. Cole, when they first went on the work, that was the plan.

Q. At first Mr. Rajotte and Mr. Fobert were not there together, as I understand?

A. Mr. Fobert and I and Mr. Crooks were there the first time together.

Q. I want to know just what part of that intention you got on that first trip, and what part you got at any other time?

A. We talked that part over at that time.

Q. Who talked it over?

A. Mr. Cole, Mr. Fobert and myself the first time we were on the job.

Q. How much intention did you gather then? What did you talk over?

A. Talked over how we would handle the work, align the line, and when we got up there, past the Kilches River, allowed to go and cast because that was their own land; that is on their own land, and we can go and make a side casting proposition.

Q. Did you start from the beginning where the road bed—from the place where the road bed was to begin, and go right on up to the Kilches River with Mr. Cole and Mr. Fobert?

A. We started down the flat, looked over the work in the flat.

Q. Where is the flat?

A. Up at Station 18, 17, down below the Southern Pacific tracks, west, looked over that part of the work, went up through the field.

Q. Were you progressing continuously?

A. Yes, sir.

Q. Were not skipping anything?

A. The first time?

Q. Yes.

A. We moved over the little flat—

COURT: Did you follow the line as staked out?

A. Yes, sir.

Q. You went then from Station 18 where?

A. We moved over a little piece, to station probably 107, to probably 126, we moved over that little flat, and smoothed it up for moving our shovel over.

Q. You mean you did actual work at that time?

A. We just smoothed it up for our shovel.

COURT: You did that the first time?

A. Not the first time. He asked when we moved the shovel.

Q. No, here is what I started out to ask you. You spoke in your testimony a number of times that you intended, or that you expected, or planned, or thought, that the work would be done a certain way. And your contention is it was done a different way. Now, I am asking you where you gathered this intention and plan and expectation from, and you said to me that you talked it over with Mr. Cole and Mr. Fobert on that first trip.

A. Yes, sir.

Q. Now, I am asking you how much of that in-

tention and plan did you gather from that conversation and survey, or whatever it was, with Mr. Fobert and Mr. Cole?

A. Gathered it all at that time. Then when they came on the job at different times—

Q. Just take that time. How much did you gather that time, how much of it? Did you go up from Station 18 to the Kilches River, and plan out each foot or hundred yards, for instance?

A. No, sir.

Q. You couldn't do that?

A. No, sir.

Q. How much did you do?

A. We went to Cemetery cut.

Q. That is is 161.

A. No, 154. At that time the clearing was not done through there, and pretty hard to cut through there. He took us on up to Kilches River. We looked at that side work through there. We went on up to Sam Down's Creek.

Q. What station?

A. 384.

Q. That is as far as you went?

A. We went beyond that.

Q. How much of your plans did you make at that time?

A. I told you Mr. Cole said when we crossed the Kilches River we could side cast. Down below that was something couldn't be side cast because not on their own property, but after crossing the Kilches River and side hill work would be allowed to cast.

Q. You were looking at it at that time?

A. Yes, sir.

Q. You could see as you went along?

A. Part of it; couldn't see all.

Q. Now, before you got to the Kilches River, how much planning did you three gentlemen do at that time?

A. Planned to put in trestle at Station 161 through on the fill, and haul Cemetery cut on the steam shovel. Was a thorough cut, and had to be hauled up there.

Q. You then arrived at the conclusion, you three, as to just what part up to the Kilchis River should be done by steam shovel, what part should be done by hand and horses, and what part should be where you should dump, and what you would have to haul? All that was planned out.

A. Surely; shows right on.

Q. I don't care what shows.

A. We planned out.

Q. You planned that time. You say is shown on that profile?

A. Shows thorough cut here, and fill by this station, surely.

Q. I am not talking about any special station. I am asking you if you made your plans at that time as to just how you were going to do all this up to the Kilches River?

A. Most of it we made. Some you have to make after you go on the job. You can't make that all the first time, you know.

Q. You can't tell, in other words, when looking it over. That is what I want to know.

A. Couldn't tell just exactly.

Q. Nobody could tell.

A. Every little item.

COURT: How long were you on that trip?

A. That first time? Just a day going over there.

Q. Now, Mr. Glavin, didn't you look up and down the line and see a good part of it from a distance of half a mile, that is, you were half a mile away from some of it, weren't you?

A. Walked over the line from Sam Down's right over the center line, the line of survey, Sam Down's to Clear Creek through there.

Q. What stations, so the court can get the stations?

A. Stations 330 to 375.

Q. You walked over that. The rest of it you didn't walk over.

A. Walked over the first part; through timber below Kilches River we didn't walk through.

Q. You walked over the part beyond Kilches River? In walking over it, you thought you were going to make dumps, going to dump the material. That is that was personally inspected, that part where you expected to make dumps?

A. Yes, sir; we walked that part of it over the center line, you see.

Q. Now, Mr. Glavin Mr. Fobert was your superior, wasn't he, there at that time?

A. Yes, sir.

Q. How much of this information did you get from Mr. Fobert, and how much did you get from Mr. Cole, and how much did you get from that profile?

A. I can't say just exactly how much I got from each one.

Q. Where did you get this information?

A. We talked it over there. I don't know just how much I got from each place.

Q. You don't know whether Mr. Cole gave you any of this information or not, do you?

A. He certainly did.

Q. Which did he give you? That is what I want to know.

A. He said would be all right to cast that out over the side through there, across the Kilches River.

Q. You have evidently been drilled nicely on the casting. I am not talking about the casting, any of these things. Other things besides casting.

MR. DOBSON: We object about the witness being drilled.

Q. I withdraw that. Let's not talk about casting. Let's talk about any other changes. Was casting the only change made?

A. You asked me about dumping, didn't you?

Q. I asked one thing. How much does that profile show there? How much information can you get from the profile?

A. Get a whole lot.

Q. And the conclusion, or plans that you and

Mr. Fobert and Mr. Cole arrived at coincided with what that profile shows? That ought to be easy to answer.

A. Pretty closely along there, yes, sir.

Q. In other words, then, you departed from the work as planned, only so far as you departed from that profile. In other words, that profile shows the plans.

A. Shows the yardage and material through there on that part of the line as located.

Q. Did you know there was a Y to be made at Station 1—Station 4?

A. Yes, sir; Station 1 to 4—no, sir, I knew there was an interchange track from 1 to 4.

Q. I mean an interchanged track from 1 to 4?

A. Shows on the profile.

Q. Does that profile show how broad that right of way was all along?

A. No, sir; doesn't show anything about how wide we cleared the right of way.

Q. I am not asking about how wide you cleared. I am asking if it shows how wide a right of way the Whitney Company had?

A. No, sir.

Q. How broad a right of way do you think they had across there?

A. Some places 60 feet, some places 40.

Q. How did you arrive at the fact they had 60 feet in some places, 40 in other.

A. Mr. Cole told us some were 60, some 40,

which should be cleared. Didn't want to clear 60 feet if it wasn't necessary.

Q. Did he show which part of the right of way had 60 feet and which part had 40?

A. No, sir, he didn't show us.

Q. Well, did you go over the line from Clear Creek to Kilches River on that trip, that first trip?

A. Sam Down's to Clear Creek at that time.

Q. You didn't go from Kilches River to Clear Creek at that time?

A. No, sir, not at that time.

Q. How far is that?

A. I will give you the stations. 235 to 330.

Q. How far in miles, approximately, would that be?

A. Approximately two miles.

Q. In other words, you didn't go over two miles of that at all?

A. We didn't go—not over all of it, no, sir.

Q. Where did Mr. Cole tell you that you would be able to dump—beyond what point?

A. Told us that after we got across Kilches River, would be mostly side hill work from there.

Q. Beyond Kilches?

A. Beyond Kilches, that was all Whitney property, and we wouldn't have to be particular about it.

Q. He told you to do mostly dumping?

A. Said could cast up through there, mostly dumping. He did not say was all side hill, not to me.

Q. He said that was his opinion?

A. Yes, sir.

Q. Would be able to cast up there?

A. Yes, sir.

Q. Did you and he and Mr. Fobert—did you and he go over this profile map at that time and point out the cuts and fills beyond Kilches where you would be able to dump?

A. We had this profile along. We didn't go over it minutely, no.

Q. He made statements, as I understand from you that when you got beyond Kilches you would be able to do mostly dumping.

A. Yes, sir.

Q. Most of it will be able to do by dumping?

A. Yes, over the side.

Q. Now, were you on the job before the steam shovel arrived?

A. Yes.

Q. Now, when did you first know that the steam shovel was to be used at 17? Taken from the station, in other words, where it arrived, the railroad station, and taken to 17 for use?

A. Well, I first knew it probably a few days before the shovel arrived. I was right on the job. I knew.

Q. That is before the shovel arrived?

A. Before it arrived, I knew. I don't just remember the date exactly.

Q. Then the first move of the shovel from the railroad station at the time of arrival was to Station 17, wasn't it?

A. Yes, sir.

Q. Who told you that it was to be used at 17?

A. Mr. Cole.

Q. I believe you said a few moments ago that you remonstrated with him?

A. I did.

Q. And he said he was the engineer, and you must do as he wanted?

A. He said "I am the chief engineer on this job, and I want you to understand it."

Q. Could you have made the fill for the warehouse down there without the steam shovel?

A. Surely, we would have had to make it if we didn't go down.

Q. I don't speak of the necessity. I mean, if it was left to you the superintendent, the fill for the warehouse, would you have chosen hand or steam shovel?

A. Chosen team.

Q. You wouldn't have done it with a steam shovel then?

A. Not if I were in a hurry to get up beyond, no, sir.

Q. I didn't speak of hurry. Is that steam shovel work or hand work?

A. It isn't steam shovel work.

Q. Is it hand work?

A. Not hand work.

Q. I mean horses and cars, not steam shovel is what I mean.

A. Yes, it is good team work, as a matter of fact, and it could have been done cheaper.

Q. Why did you and Mr. Fobert and Mr. Cole reach the conclusion that you wished to get the steam shovel ahead?

A. Mr. Cole wanted to get ahead, and we were supposed to finish that work at a certain time, and we had to go ahead to do it.

Q. You said that Fobert was your superior there? You heard Mr. Fobert testify, didn't you?

A. Yes, sir.

Q. You heard Mr. Fobert say that the only reason for getting that steam shovel across the river before the raise was that they wanted to ford the river they couldn't do after the raise didn't, you?

A. I don't remember hearing him, but of course that was one idea. You had naturally to get up there; by keeping down in the flat you couldn't make it. That was one idea to cross the river ahead.

Q. That was one idea, and another idea, then, as I understand you, was that they wanted to hurry the work. What were you going to do on that down at 17, along in there?

A. Going to put teams in there and do it with teams, while working up ahead with a shovel outfit.

Q. When you were going to put teams in there?

A. Would put teams in there the same time. We had teams in there the same time doing part of that work.

Q. Were teams working in addition to the shovel?

A. Yes, teams working.

Q. And with teams and steam shovel working,

how long did it take you do that work you did from 17?

A. 25 days.

Q. How long would it have taken you with teams alone?

A. That I couldn't tell you exactly.

Q. Just your estimate?

A. Probably would have taken two months.

Q. To do that?

A. That depends on how many teams you would have. You see you could get teams and put them in there.

Q. With your outfit, how long would it have taken, with your teams you had on the job there?

A. It would have taken probably two months.

Q. Now, Mr. Glavin, didn't you expect there were to be changes in the alignment of this railroad from that profile?

A. Did I expect it? I didn't expect it. Might be.

Q. You didn't expect it. You thought it would be constructed exactly like that profile, is that it?

A. No, I didn't expect to construct exactly. I thought pretty close to that.

Q. Did you ever see the contract in this case?

A. Saw it once.

Q. Didn't your superiors inform you as to the terms of the contract?

A. Yes, sir.

Q. Did they inform you that there was a provision in the contract that the engineer of the Whit-

ney Company could make such changes as he saw best, or something to that effect?

A. No, sir, they didn't inform me.

Q. What?

A. They didn't inform me of that.

Q. Did you know anything of the right of the engineer to make changes?

A. I read the contract, yes.

Q. Then you knew that?

A. Yes, sir.

Q. But you didn't expect them to exercise that right, is that it?

A. I had absolutely nothing to do with what they would exercise.

Q. Yes, but you are telling the court what you planned to do, and they didn't do it like you planned it. I want to know if you planned on the basis that they were to stick right to the line?

A. Well, I thought approximately, you see. Not quite to the line, no.

Q. You didn't expect any changes to amount to anything?

A. Not like that, no.

Q. How far up the line was this road bed staked out with stakes in the ground?

A. Staked? At that time we were at Sam Down's. That is as far as I saw the stakes.

Q. That is the first trip up there?

A. Surely; I didn't go any further at that time.

Q. Now, if it wasn't staked out any further, by

an examination of it you couldn't tell very well where it was going to be, could you?

A. I didn't go any further at that time, you see.

Q. I know, but you were superintendent on the job, and I am asking you if you, as superintendent, could tell just where that railroad was to run when it wasn't staked out?

A. Couldn't tell exactly. You could tell pretty closely down there.

Q. How close? How many feet one way and the other?

A. Probably 30 or 40 feet you could tell down through there.

Q. In other words, it was a question of 30 or 40 feet one way or the other?

A. That is as near as I would be able to tell. I didn't go up through there at that particular time.

Q. But if you had gone up through there?

A. They had a line projected up through there. They had some stakes. They had a center line, through there at that time.

Q. Do you understand as a railroad construction superintendent that those stakes run up there beyond the point where they had a location meant that the road was to run right where these stakes are?

A. No, sir, I knew that it wouldn't have to do that. They could change it of course.

Q. Aside from the provisions in the contract, you know as a fact, and as a practical matter, that that doesn't mean that the road bed was to run right where those stakes are, don't you?

A. It doesn't have to. They can change it, of course.

Q. Do you know in locating a road that nobody ever built one and followed those stakes in there.

A. Depends on whether a preliminary location or permanent location.

Q. What was that, preliminary or permanent?

A. I think that was a paper location from Sam Down's up ahead.

Q. Preliminary location then?

A. Yes.

Q. You know, as a matter of fact, that is within your knowledge, no one ever did follow out these stakes exactly, in this case or in any other case?

A. In this case it showed by the quantity on the profile. It showed each cut and fill and quantity.

Q. I will come to that. I am talking about the alignment of this railroad. You didn't expect them to follow those stakes. You didn't expect those stakes to be the center line between the two tracks, did you?

A. Oh, no.

Q. What?

A. Certainly not.

Q. You knew that a change at 30 or 40 feet, if such were made, would not be unreasonable, didn't you?

A. You asked me if I could tell within 30 or 40 feet without any stakes?

Q. With stakes. If you had seen the stakes there, do you mean to say the road bed would have

to follow those stakes? That would be the center line.

A. Not necessarily, no.

Q. What deviation would you say would be reasonable?

A. On construction a fellow might see some betterment some way, or better the condition of the line.

Q. How far would you say would be a reasonable matter, as a practical problem?

A. Might want to eliminate some curve, reduce some grade, or something, make that a little better after he runs the permanent line and cross section; get the cross section. Might be able to determine that in better shape.

Q. Then you wish to tell the court that you knew, and anybody else would know that when they come down to the construction of that line there would probably be changes made, eliminating the curves and bettering the road.

A. The first time we were talking, Cole said that they would build a logging line and straighten up afterwards. The first operation was supposed to go through and build the line, get it built as quickly as possible.

Q. He told you they would go through it and straighten it up, as I understand; that line wasn't the final line?

A. Said would have to go up there if they could, when they were doing some hauling themselves; they could do some straightening on it.

Q. You mean after building the railroad?

A. He said could straighten up, could do it cheaper afterwards, straighten it up.

Q. I understood you to say he was going to go along and straighten it up, told you to straighten up the line you were to go by. Now where did you get your figures in determining what percentage of increase, and how many dollars of increase this work occasioned, the various extra works you have detailed to the court?

A. Took that off our daily distribution sheets. The actual time were in there working.

Q. Made an approximation on that. Have you got a memorandum with which you can refresh your memory on that?

A. I just took it off the daily report.

Q. Have you got those?

A. I have them, yes.

Q. Did you take that off your books?

A. Off our daily report. I can't state exactly.

Q. No, I am not trying to test the exact accuracy of the figures. What I want to know is how could you tell that there was an increase? Where did you get your starting point?

A. You mean an increase for overhaul?

Q. Yes.

A. Figure from your cars. I understand how to figure overhaul, you know. I can figure it out.

Q. Take the excavation. Overhaul is a little hard job. Take excavation. How do you know was increased?

A. Took our car check on a lot of that.

Q. How did you know how much excavation you were supposed to do?

A. Took it off our profile. That is the only way we had of telling at that time.

Q. Now, in making your excavation, for instance, did you follow the cross sections as laid out by the Whitney Company's engineers?

A. As near as I could, yes.

Q. And are you prepared to say that you excavated only the excavations as staked out by the Whitney Company?

A. Not on a neat line, no.

Q. Did you have any line, any instances in which you deviated further from the stakes than a ragged line would deviate from a neat line?

A. Yes, sir.

Q. Tell us about that.

A. There was an instance up about—

Q. State the station to the court.

A. Station about 290.

Q. Why did you excavate an excessive amount there?

A. To make the fills. They had changed the lines. The fills on the profile showed about 960 yards, and we put about 3,000 yards in it. We afterwards hauled back from up in front to widen this fill, and put it up to grade. It was still a little slack.

Q. Did they have the road bed staked out in accordance with that profile, as far as it was staked out?

A. At that time, yes.

Q. You say, then, that their stakes corresponded with this profile?

A. Well, I don't know that it corresponded exactly. They were putting in cross section stakes. Of course you can't tell whether corresponded with the profile, or not. Couldn't go up and tell that by looking at it. No one could.

Q. Didn't you keep any measurements?

A. The car records were all. Never got an estimate on the job at any time, showing how much yardage moved. Never had an estimate showing that.

Q. Do you mean to tell the court that you, as a superintendent would ask the people you were working for to give you an estimate of the work you were doing?

A. Customary on all railroad work, to get an estimate every month, of the quantity you have moved. Get an estimate every month.

Q. Didn't you keep that estimate?

A. Never got one there to keep.

Q. You moved it. Mr. Morris didn't do the moving. You did the moving yourself.

A. Just kept our car record. Checked by our car record, which isn't absolutely correct check on the measurements. Can't get that exactly.

Q. You mean you said, and gave the court all those figures when you didn't keep any records?

A. Took those off the final quantities.

Q. You didn't keep the figures then. You got them from us. You got our figures.

A. Figures off the final estimate, yes. Just took them off that. Our car record, of course, shows the amount of yardage moved, but that isn't always correct.

Q. How do you know that you were moving more material than you contemplated moving, if you didn't keep any records?

A. We kept our car records, I told you.

Q. Did you have an estimate by cars of how much you intended to move?

A. Got the estimates on the profile, and we could check our cars with it.

Q. How many times after you had your shovel at 17, having moved that from the railroad station to 17, how many times after that did you move your shovel backwards?

A. Move it backward?

Q. Backward. I don't care where.

A. Moved it back to Station 8 once.

Q. When was that?

A. In December.

Q. That was from where?

A. After we had gone up the line.

Q. You moved backward only once then?

A. Surely, just moved back one time to Station 8.

Q. The reason I am going into that, I have heard you say you moved back twice.

A. No, you didn't hear me say that twice.

Q. You moved back only once then?

A. Moved back from Station 231. Moved back once to Station 8.

Q. That is the only time while you were on the job that the shovel was moved back from where you were working?

MR. DOBSON: He didn't mean that.

A. I mean we moved back from Station 231 to 8 west; where we dug at some other cut, moved ahead at the first lift, then moved back and dug at the second lift. Cannot do any other way.

Q. I am not referring to that.

A. Just the one time.

Q. You moved back once?

A. Yes, sir.

Q. That was the time that you moved back for the purpose of raising the grade between approximately 200—

A. Approximately 107.

Q. Up to approximately 122.

A. Yes, sir; 126.

Q. In what condition was that road bed between 107 and 122—or rather what condition would that road bed have been in if you had allowed it to stand under water for three or four weeks?

A. They had it corduroyed and checked up, would hold the track up.

Q. What condition would it have been in if you left it as it was? If you left it without going back at that time?

A. Of course wouldn't be in good condition.

Wasn't when we went back, in fact. Was under water.

Q. Do you or don't you see the justification in Mr. Norris' requesting that you people go back and fix up that road between 107 and 122.

A. I can see his justification in it, you bet.

Q. That is, that by leaving it under water, the road bed is bound to deteriorate, isn't it?

A. Yes, nevertheless it kept us from going on up the line.

Q. I understand that. That delayed you. You wanted to go ahead. I am asking you now if the road bed wouldn't have deteriorated by being left in the condition it was?

A. Yes, it would.

Q. Now, Mr. Glavin, suppose you had followed out there the way Mr. Cole told you, and beyond Kilches dumped most of the material. That is what he told you he thought you could do. Could by that method a road bed been built that would have been usable?

A. Yes, sir.

Q. In doing that then, if you had dumped and he had let you run it and dumped, you say you could have built a road bed that would have been usable?

A. As a logging road, yes.

Q. Now, you speak of extra work that you did costing you so much more that it would have. For instance, moving that shovel back—I mean to take the shovel from the station to 17 instead of taking it on up to Cemetery cut, where you wanted to start.

You told the court that cost you so many thousand dollars to move it, and cost you so many thousand dollars to build the track, etc. The Whitney Company were paying you for all that, weren't they?

A. Absolutely, yes, sir.

Q. They were giving you a percentage?

A. Yes, sir.

Q. Above the payroll, weren't they?

A. Yes, sir.

Q. You did cast some up above Kilches, didn't you?

A. Why, I was there very, very little.

Q. Sir?

A. Not while I was there over two or three—

Q. You were not there very long after they passed the Kilches River?

A. Left there in June. I think they did some casting but not while I was there to speak of.

Q. Then you don't know whether or not Mr. Cole's statement that he thought you could cast mostly above the Kilchis was carried out or not, do you?

A. No, sir, I don't know.

Q. Well, did you detail anything to the court there that you didn't know while you were personally on the job?

A. No, sir.

MR. DOBSON: I didn't take him beyond station 448.

A. I was beyond the Kilchis River.

Q. But anything you told the court, you knew of your personal knowledge; you were there?

A. I was there on that.

Q. How do you know that there were stakes beyond that part of the road bed that was located?

MR. DOBSON: He didn't say that he did.

MR. FREED: He said was staked out and I ask him.

A. I said as far as Sam Down's; I was that far and it was staked out.

Q. Beyond Sam Down's I am asking you now.

A. I was up above Sam Down's lots of times on the work when we were there; they had stakes in it.

Q. That is the part in which you said that it is known that they are not going to place the alignment just exactly along those stakes; you didn't expect that?

A. I didn't know what they were going to do.

Q. Now, you told the court that you were held up down in mile A or Mile 1 by Mr. Woods who had the clearing contract, didn't you?

A. Yes.

Q. He fell down on the job I believe you said.

A. Yes, he did.

Q. Who let that contract to Mr. Woods?

A. Mr. Cole is the fellow who let the contract. Mr. Cole and myself were down there together. Mr. Cole brought him down, a particular friend of his, and let him the contract.

Q. Who was, Mr. Wood?

A. Mr. Cole; I had never seen the gentleman before.

Q. With whom was the contract between, Mr. Wood and yourself, or Mr. Wood and the Whitney Company?

A. Mr. Wood and the Rajotte-Winters Company, but was supervised by the chief engineer because he had to sign the contract, and he signed the contract; I signed it with him.

MR. DOBSON: The contract provides that all sub-contracts must be approved and accepted by the defendant company.

Q. That is all right, but is this the contract?

A. This is the contract, yes, sir.

Q. Was there any assistance on the part of the chief engineer that you accept Mr. Wood as the sub-contractor thereon?

A. Absolutely not. That was to help things out, to get that done, that is the idea. He said—

Q. Then do I understand that you are blaming the Whitney Company and their chief engineer because this subcontractor fell down on his clearing.

A. I am not blaming. Just shows we had a little delay there.

Q. I understand that, but are you saying that they were responsible for that delay?

A. Certainly not; they are not responsible; the fellow fell down on the job.

Q. Then if the complaint asks for any damages because of that delay, you don't think that is very just?

MR. FREED: I would like to offer this contract in evidence.

MR. DOBSON: For what purpose?

MR. FREED: To show whose subcontractor Mr. Woods was; we are blamed for his acts.

MR. DOBSON: No objection if that was the purpose.

MARKED DEFENDANT'S EXHIBIT A.

Q. Now, in regard to that move that we spoke of, the only move backward that was made, from two hundred and thirty-one or thereabouts back to eight, I think you said, west?

A. Approximately, yes.

Q. I think you said, didn't you, that you didn't hear any conversation that might have taken place between Mr. Norris and Mr. Rajotte in reference to that?

A. You asked me before we moved back.

Q. Yes, before the move was made.

A. No, I did not.

Q. If there was any objection made before the move, you don't know about it?

A. By Mr. Rajotte, I don't remember.

Q. That is, you personally didn't know it?

A. No, sir, after we were on the job, moved back, I remember.

Q. Now, you spoke of using steam shovel back at near the warehouse, I think, on that move back from 231, didn't you?

A. Yes.

Q. Had you used the steam shovel about the same place when you originally placed it at seventeen?

A. Not the same place; we went in a different borrow pit altogether.

Q. Right in near there, wasn't it?

A. Well, it is probably eight or nine hundred feet.

COURT: Where is the warehouse you speak of?

A. The warehouse is about station one or two west, or about station eight west.

COURT: When the steam shovel was located the first time, after it arrived over the railroad, it was located at seventeen, wasn't it?

A. Approximately seventeen west, yes.

COURT: What was the purpose of locating it there?

A. To make this fill and interchange track and do that work in there.

COURT: Did that include the warehouse foundation?

A. No, sir, not to include the warehouse. They later figured on putting up a warehouse there. We did some filling around it for the ground where the warehouse was going just for the tracks.

COURT: That was the first time?

A. That was the first time, yes.

COURT: Did you do any filling there when there the second time?

A. The second time were there put in for the ma-

chine shop and some additional filling around the warehouse.

COURT: The same locality?

A. Right in the same locality; right in the same ground practically; just widened it out and put a machine shop.

Q. Did that profile show what was to be casting and what was to be removed by any other method?

A. No, sir, it doesn't show how we are to move it.

Q. If the road bed had been built according to that profile, you could have cast just as you say Mr. Cole told you?

A. You couldn't have cast it all, no. There are some thorough cuts where you couldn't cast it.

Q. What I am referring to, is you said Mr. Cole told you you could cast certain parts, which you later did not cast. Now, I am asking you if that profile showed to you that you could cast any parts that you were not allowed to cast?

A. That doesn't show that.

Q. The profile doesn't show what method you could use, does it?

A. Absolutely not. That doesn't show what you could do on that particular site. Shows the work, side or thorough cuts, and if he is willing to let you do that, you can.

Q. When were these conversations with Mr. Cole, before or after the contract was signed?

A. I am not sure the contract was signed the day we went down there or not.

Q. It was signed June 21st.

A. The day we first went over the line was along about that time. I am not sure whether the contract—

MR. DOBSON: He doesn't know whether the contract signed or not.

A. It was just about that time the first time I was down; I know about the time it was signed; I am not sure whether signed before or after; I couldn't say as to that.

Q. At any rate, this profile wouldn't show about the casting. Mr. Cole's statement is what showed you about it?

A. He said when we got up there on his own land, later on, were to expedite the work and rush things.

Q. But that profile doesn't show that?

A. Doesn't show you do that at all.

COURT: Were the lines staked out along where Cole said you could cast?

A. Staked out part of the way, Your Honor.

COURT: Did you follow along the staked-out line?

A. Yes.

COURT: Right up through there and examine it?

A. Yes.

COURT: Could you tell yourself whether you could cast or not?

A. Yes, could tell by going over the line, the side work; we were able to tell it and determine what we could cast. Sometimes they would allow you to

cast some more and widen it a little bit; you can cast; I will show you how we could have done some of this.

COURT: Who prohibited you from doing the work that way?

A. The chief engineer made them stick strictly to the way the line was made out and haul it, and make really a better line. The line was a little better than first contemplated, than Mr. Cole contemplated. He was going to allow us to go along and cast.

COURT: The reason you didn't cast was you weren't allowed to cast?

A. Better line; they held us more to the way it was laid out, you see. Of course, that took longer, and a little more time—it took longer and a little more money to build.

COURT: Do I understand you to mean, now, that while you contracted to build according to this detail, I mean this profile, that you didn't intend to do the work that way?

A. We intended—

COURT: Because the company required you to do it as you agreed to do it?

A. We agreed to go up through there the way he said we could cast a lot of that material, and expedite the time of the work and keep going, and since that it was just a haul; made a cut and fill proposition, and all haul and really a better line built than we first contemplated.

COURT: A better line than the one called for by the profile?

COURT: That was because of the change then?

A. Yes, some changes, material clearing, widening out, eliminating some curves and reducing some grades.

MR. DOBSON: As a matter of fact, the profile indicates that along the route, doesn't it?

COURT: What I want to know, is why he didn't cast; who prevented him from casting? He is claiming, as I understand he couldn't dump the dirt over the side down the hill, but had to move it some other way. I want to know who is responsible for that?

A. The chief engineer is responsible for not letting you do that.

COURT: Did he prohibit you from doing that so you couldn't do it?

A. Yes, sir, he figured it made increase of quantity that way.

Q. What was his reason? I didn't get that.

A. I presume afraid it would increase the quantity.

Q. He thought that would be cheaper that way, is that it; the way he required you to do it?

A. Mr. Cole's idea was it would be considerable cheaper to cast than haul; figured it would be much cheaper but would make a more ragged line, and not as well finished roadbed or as good a railroad.

Q. As I understand it, you say if you had built the roadbed just exactly in accordance with this profile, you could not have cast all of that material Mr. Cole told you you could?

A. No, sir.

Q. Sir?

A. You could not.

Q. In other words, then, if you had built it just according to this profile and according to the specifications in your contract, you could not have cast very much of that.

A. Couldn't have cast it, no.

Q. Couldn't have cast it all?

A. No, sir.

Q. You couldn't have cast very much of it?

A. Could have cast quite a lot of it to the side, yes.

Q. But there is a good deal of it that you gathered from Cole's information, you wouldn't have to cast, which later he made a casting there—which by this profile is called for casting—not on the profile, but I mean if you followed out the profile would have had a casting?

A. Could have cast it.

Q. Then you mean to tell the court, if you had followed out this profile and followed out the specifications in the contract, that really you could not have cast a good deal of this stuff you are complaining about now, that he didn't let you cast?

A. Lot of it you could have cast that we didn't cast, quite a lot of it.

Q. I understand that, but a lot of this was—

A. Some thorough cuts, you know—you really can't cast thorough cut, you understand.

Q. Your complaint on these points is that Cole

held you to this profile; that is what I understand, isn't it?

A. Well run these lines and took up a lot more of our time.

Q. If he hadn't held you—if Cole and Mr. Norris later hadn't held you to the specifications you could have gotten along much more rapidly?

A. Could have got up there quite a lot more rapidly.

Q. If you had adhered absolutely to this profile, all the way through, could you have, with the force of men that you had on the job, and the system you were employing, have finished this railroad by January 1st, 1920? What is your opinion of it?

A. My actual opinion is, I don't think we could have.

Q. You couldn't have, could you?

A. No, sir.

Q. When do you think you could have; opinion only, I understand.

A. I couldn't say as to that, when we could have finished.

Q. How much longer?

A. I think within two or three months.

Q. It would have been two or three months longer?

A. Yes, sir.

Q. In other words, by your own estimate, you would have been thrown into the winter on a good part of this work, which you did the next spring of 1920?

A. The rains started in the fall in October the year that we were there; very wet.

Q. You knew you had to do the work in October weather?

A. Yes, I say this was very wet.

Q. You couldn't have possibly finished it under your system and with your men by January 1st, 1920, you say?

A. Not with the same force by cutting and hauling it, no.

Q. In other words, then, it would have taken you, if you followed those plans strictly, the month of January and February, making your minimum of two months, in addition to the time that you actually planned?

A. By doing it just the way it was here strictly by the profile.

Q. And therefore you would have been thrown into the winter?

A. Yes, sir.

Q. Anyway, you would have had several wet months?

A. Very wet.

Q. And even if you hadn't been delayed down there at 1, or at 17, you still would have been thrown away into the winter, wouldn't you?

A. We lost practically three months of our time down there.

Q. You would have been thrown into the winter anyway?

A. Surely.

Q. You did a lot of this work the next summer of 1920, didn't you?

A. Yes, sir.

Recess until 2 o'clock p. m.

Thursday, October 25, 1923, 2 p. m.

MATT GLAVIN resumes the stand.

CROSS EXAMINATION continued.

Questions by Mr. Freed: Mr. Glavin, what were you paid, what was your interest, I mean to say in this work? Did you get a salary only?

A. No, sir; I was to get a percentage at the wind-up, if they made anything on the completion of the job.

Q. Just explain that a little more fully, please—what you mean by getting a percentage.

A. On the contract there was a lot of work for the superintendent; the way they pay, they say salary and percentage, so if you get the work done more cheaply—have an interest in the work and get along better.

COURT: Percentage on what the contractors earn under the contract?

A. Just what they would earn, yes, sir; 10 per cent of that on the windup of the job.

Q. Were any other employees to get a percentage like that, were promised a percentage like that?

A. No, sir.

Q. Just you?

A. That is all I know.

Q. Did you get anything?

A. No, sir.

Q. You just got your salary. Did you ever superintend the construction of a logging road.

A. No, sir; not a logging road.

Q. This was the first logging road that you ever——

A. First logging road, yes.

Q. The first job of that kind you ever built?

A. Logging road, not railroad. Been on lots of standard gauge railroad.

Q. But logging road?

A. Logging road, yes.

Q. You never had experience of just this kind before?

A. The same experience on standard railroad, Northern Pacific, Great Northern, building standard gauge line.

Q. Did you ever build a railroad in which you dumped the materials just as you say Mr. Cole and you and Mr. Fobert expected you could do?

A. We had part of the line at Kettle Valley in Canada that we did that on three miles of the work that was side hill.

Q. I am not going to trouble you to go back over very much ground, but want to straighten out one matter here. I believe you said you did not go over very much ground on this first visit down to the scene——

A. No, sir——

Q. Just a minute. From the Kilches River to Clear Creek?

A. Not all of it; no, sir.

Q. Will you turn to that on the profile and show the Court what we are talking about out at Kilches.

A. Here is Kilches River.

COURT: What station is that?

A. 220 - 221. We came up around here over east, and went to Sam Down's and came back, walked back from Sam Down's to Clear Creek, but we didn't go over from here to Clear Creek on that first time over.

Q. How far is that?

A. Approximately a mile and a quarter, eight stations, eight thousand feet.

Q. And about five stations to the mile, not quite a mile and a half?

A. Not quite.

Q. You said that as far as that part of the road bed was concerned, you were in Mr. Cole's automobile along the highway; that is, you skipped from Kilches over to Clear Creek in Mr. Cole's automobile, didn't you?

A. Went from Kilches up to Sam Down's walking and came down the line from Sam Down's to Clear Creek.

Q. Yes, but from Kilches to Clear Creek you passed over that?

A. We didn't walk over the line.

Q. You passed over that in Mr. Cole's automobile, that is, you passed by that?

A. Passed by on the road, yes.

Q. Isn't it a fact that the road is on the opposite side of the river from this road?

A. Yes.

Q. So as far as that part of the road bed is concerned, from Kilches to Clear Creek, your sole view of it on this trip that you spoke of was from the opposite side of the river?

A. Yes, from Kilches to Clear Creek.

Q. How far would you say this highway along which you were traveling was from the alignment, approximate line of the road?

A. Some places five or six hundred feet, I think some places a little more than that, where the road runs away from the river.

Q. Five or six hundred feet, and some places a little more.

A. Yes, sir.

Q. In other words, you were traveling along the highway—here was the river, there was the alignment you understood the roadbed to take. That was from five to six hundred feet, varying into a greater number of feet?

A. Yes, sir.

Q. And is it, you say, in that part of the roadbed that Mr. Cole told you would be able to dump, do a lot of dumping, wasn't it?

A. From there and up from the end to over the projected line along the line where we could go along from there up.

Q. That was one of the main places where you would be able to dump?

A. Yes, sir.

Q. At which you were looking from the highway across the river?

A. Yes.

Q. You really didn't see any of that, did you? Could you see any part of it?

A. No, sir; we couldn't.

Q. What was in the way?

A. Timber.

Q. How much of it would you say—how much of that mile and a third—I think it figures about a mile and a third, or a mile and a quarter—of that stretch could you see, do you think. I am not asking you to be accurate.

A. I could see probably—could see about 3,000 feet.

Q. You could see a little more than a third of it?

A. About 3,000 feet, I think approximately.

Q. And 8,000 feet would be the total. That was one of the places where the dumping could be done, and the other place that Mr. Cole spoke of was beyond where you went. You said you went on up to beyond Clear Clear in an automobile. Then you got out, as I understand it, and came back to Clear Creek.

A. Went across the river.

Q. What was the extremity to which you went? How far up? Just the station.

A. 390, I think. Just the other side of Sam Down's, where you cross the creek.

Q. The other places Mr. Cole spoke of being a dumping job was beyond 390?

A. He said that was the projected line and could

look through there when we got to it, right around the contour of the hill.

Q. You didn't go up there?

A. No, sir; I did not.

Q. You didn't look at that?

A. I didn't look at that.

Q. And Mr. Fobert didn't on that trip?

A. Mr. Fobert was with me on the trip. He did not.

Q. But you just took Mr. Cole's statement for it that up there would be a dumping ground?

A. Yes, on the projected line. Said to go up there and around the side hill; get it done as quickly as possible.

Q. You knew the line hadn't been staked out up there?

A. Knew it had been projected; from his remarks was a projected line.

Q. Tell us what you mean by projected line?

A. Paper location; just went up there on preliminary location, and he had a map which showed very closely. I don't know how he got it so closely. As a matter of fact, your Honor, not an engineer or contractor can take one of these profiles and tell you from the profile how you can do the work absolutely. That is impossible. Can't take an engineer, any engineer in this city, or contractor who can tell you just how to do the work from looking at a profile, of course. Mr. Cole, the engineer that projected that line said when you got to Sam Down's Creek to

ignore some of these lines and make cast just as quickly as possible, and after it was run they could afterwards fix that up with their own trains, haul some material back and line it up. That was the understanding at the time I had with Mr. Cole—Mr. Cole's sanction.

Q. Well, Mr. Norris didn't stick to that but made you adhere more closely to this profile?

A. Yes, sir; I didn't finish that work up there.

Q. And this is the profile that was submitted to Mr. Rajotte when he entered into the contract?

A. Yes, sir.

Q. Will you please turn to that profile to Station 237. Have you that?

A. Yes, sir.

Q. Now, you tell the Court that in order to make the fill between Station 237 and 248 that you found after you got up there that you had to make a borrow pit at Station 250 to haul the material from 250 to 237—to the space between 237 and 248.

A. Yes, sir.

Q. That you hadn't contemplated that. You thought that you could pick up that material to fill between 237 and 248 along the side of the bed. That is correct, isn't it?

A. That was the understanding first that we could do.

Q. Yes, I want to be sure all of us understand what you said.

A. But remember it wasn't the way I saw the profile.

Q. I know, but that is what you understood was to be done.

A. Yes, that is the idea.

Q. And your complaint was that that wasn't done. That we made you go to 250—that is, you had to—as a matter of fact had to go to 250 and make a borrow pit and haul the dirt back?

A. Yes.

Q. You said one reason for that was that the right of way along there was not broad enough?

A. That is what Mr. Cole said. He first said to take out with teams. As a matter of fact, the profile showed borrow at this station, and he said to go in ahead of it and take out with teams at the side, but finally said was not wide enough right of way.

Q. When did he say go with teams?

A. When fencing down below. In September said could go up and get across above the highway.

Q. When did you do this borrow at 25?

A. In September.

Q. In other words, he told you in September, and you did the work in September?

A. We did the work, I think, in February.

Q. As I understand it, you expected a right of way there? You didn't have enough right of way. You couldn't dig from the sides. That is the fact, isn't it? I mean, that is your contention?

A. Yes, sir.

Q. You said this morning also that you had understood—I believe I am correct—that you understood the right of way was from 40 to 60 feet?

A. That is what I understood, some places 40 and 60.

Q. You worked on that basis, at any rate? Now, do you know how wide the right of way was between Station 237 and 248?

A. No, sir; I do not.

Q. Do you know that it was less than 60 feet?

A. I don't know what it was. The understanding I had with them was that they had just made a deal with the farmer there to just put a fill in and not take any more of his land than necessary.

Q. Can you look, or refresh yourself from any paper, and tell the Court how broad the right of way was that you had to work from there?

A. No, sir; I can't tell how wide it was. They put the fill in there; nothing but just slope stakes where they put the fill in. I don't know how wide the right of way was at that time.

Q. For all you know, the right of way might have been 60 feet?

A. Absolutely. Might have been a hundred. I am not sure of that. I am not sure on that part of it.

Q. Why didn't you dig the dirt from the sides?

A. He told us he didn't have the right of way.

Q. Then I am asking you—he told you he didn't have the right of way to do it, but did he tell you he didn't have 60 feet right of way?

A. No, no; didn't tell me how much; just said wouldn't be wide enough on the right of way to take out a borrow pit on each side and leave a berm along the fill.

Q. So we will get it in the record; doesn't this profile show that between 237 and 248 there was a big fill?

A. Yes, shows six thousand yard fill from Station 237 to 248—249.

Q. It shows a fill?

A. Yes.

Q. You were not surprised to find a fill there?

A. No, sir; I saw a fill there.

Q. Yes, you saw it and the profile shows it. Doesn't this profile show they were to borrow the dirt to fill at 250?

A. Shows borrow right here.

Q. Doesn't it show further that that was to be brought back?

MR. DOBSON: Get it in the record what station.

A. 250.

Q. Shows at 250?

A. Yes, 250.

Q. Doesn't it show that the borrow which was to be made at 250 was to be brought back for the purpose of making this fill?

A. Absolutely it shows that. Shows on the profile; he was going to have this changed. In expediting this work, going here, to start here and cast that. This shows just how it takes. If you get me, this

don't show here; I didn't say that. The arrangement was to move the teams up into that, finish down there, and get this done, so we come across, go on up the line. Mr. Cole's idea was to get up as quickly as possible. He meant to co-operate and do everything he could get up.

Q. Now, in that part of the complaint which your company has filed here, in reference to requiring you to borrow from 250 and haul the thirteen hundred yards, or so back to make the fill, that was shown on that profile map?

A. Absolutely was shown right here.

Q. And when Mr. Rajotte put his name, or the name of his company to that contract, he should have known that it was required, shouldn't he?

A. It was here.

REDIRECT EXAMINATION.

Questions by Mr. Dobson: Mr. Glavin, Mr. Freed asked you something about the fact that you had a percentage on this work. Just what did you understand by that? How were you going to gain by that?

A. Going to gain?

Q. Yes, how were you going to gain by the fact that you had a percentage on the work? What was it incentive for you to do?

A. We were to go along as fast as possible, and when they finished the work up, whatever they made on the finish, I was to make something out of it, a percentage, 10 per cent.

Q. Did you understand the reason you had a per-

centage you were to add as much to the cost of this work as possible?

A. No, sir; if we finished at a certain time, we were to get more.

Q. Was that what you had in mind?

A. Yes.

Q. That is what you were endeavoring to do?

A. Absolutely. Wasn't figuring on carrying the job on at all.

Q. In cross examination, Mr. Freed referred to the fact there was only one move back with the steam shovel plant, when you referred to the fact there had been two moves back. Just what did you mean on direct examination? You brought out the fact that the steam shovel plant was moved back on two occasions.

A. Moved back?

Q. Yes.

A. Moved back from 231 once, then moved down from the Southern Pacific once, the first time. That was the original move.

Q. That is what you referred to when you said two moves back?

A. If I did, I didn't mean it that way.

Q. As a matter of fact that was a move back?

A. Wasn't what you call a move back, because it had gone down from the S. P. station down to Idaville.

Q. Well, for instance, your original plan was to send the steam shovel ahead?

Q. Yes.

Q. Move forward, instead of that moving back?

A. Move forward. We hadn't gone ahead at that time.

Q. That is what you referred to, or what you meant when you referred to the fact there was a second move, or two moves.

MR. DOBSON: I may want to recall this witness later in the case, if there is no objection, but that will be all at this time.

Witness excused.

A. FOBERT—Recalled by the plaintiff, having been previously sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. Dobson: Mr. Fobert, you have been on the stand once before in this case?

A. Yes, sir.

Q. And I want to ask you now when you went back to this work after your first visit down there, when you made the—assisted Mr. Glavin in making plans and preparation for carrying on the work, when did you next go back to the work?

A. I couldn't tell the exact date. Went down there when the shovels were working.

COURT: What?

A. When I went down the second time the steam shovels were at work.

COURT: Where was it, do you know?

A. Station 17.

Q. That was just a casual trip, was it not?

A. Yes.

Q. You didn't go down there at that time with the intention of staying?

A. No.

Q. What I refer to is the time you went back to this work for the purpose of taking charge and staying there or assisting Mr. Glavin, or whoever was in charge of the work?

A. You mean when I went back to stay there?

Q. Yes.

A. January 17, I am in charge. That is when it was. I think January 17. I may be off a month there.

Q. That was the early part of 1920 or the latter part of 1919, is that what you mean? It was during the winter time, was it?

A. Yes, 1920.

Q. Now, Mr. Fobert, can you take the profile and point out to the Court just about where the steam shovel was at that time?

A. About Station 282.

Q. About 282?

COURT: How far is that from the crossing of the river, that is at 231?

A. About 4,000 feet.

COURT: Had the work been done from the river up to where you found the shovel?

A. Yes.

COURT: It had been done when you went back? What time did you say you went back?

A. I may be a month off. Either January or February 17.

COURT: Some one testified that the shovel remained down at Station 8 until January.

MR. DOBSON: We will establish that time. Mr. Martin, can you give it when Mr. Fobert went there and took charge of the work? Look it up and we will put it in the record.

MR. MARTIN: About the first of February, I think.

MR. DOBSON: We will get the correct date.

Q. Now, from the time you went up there, I wish you would tell the Court in your own way just what changes were made in the line, starting in for instance at the point where the steam shovel was when you went up there, and just go right along on the profile and point out to the Court the changes that were made by the defendant in the construction of that line—that is, different from the profile.

A. Change was made about Station 334 along there. I couldn't give you the exact point. That change was made from about there. The grade was straightened to throw it up the hill. It made a bigger and a longer cut.

Q. Just mention the particular cuts, and give the station numbers; that will save time.

A. You want me to give the length of the cut?

Q. Just state about the points where the changes were made.

A. Change was made at this station here, about 332, along in there, and made to make a better bridge, and straighter or better roadbed; bigger cut instead

of making a short—we had a short—that is the profile shows here a thorough cut a little way, and shows more side work, but this change made it almost all thorough cut. That is thorough cut about—around twelve to thirteen hundred feet cut. Maybe a hundred off, fifty, something like that.

COURT: What is the cut shown on the profile?

A. The profile shows about ten or eleven foot cut, highest point.

COURT: You say you changed the cut to thirteen hundred feet long?

A. When they made the change, made a bigger cut, deeper and longer.

COURT: How much longer did it make?

A. This first cut here, the way this profile shows is about four hundred feet thorough cut, and the change made it about thirteen hundred feet and deeper cut.

Q. Mr. Fobert, while we were on that, were you there? Were you in charge of the steam shovel when that work was done?

A. When the change was made?

Q. When you did this work you were there, were you not?

A. When they made the change?

COURT: When the work was done?

A. I wasn't there when the change was made here.

Q. I mean were you there when the work was done?

A. When the work was done in the thorough cut.

Q. And you knew about the increased length of the cut?

A. Yes.

Q. Just state to the Court whether the increase in yardage was considerable, or was comparatively small?

A. It increased the yardage a whole lot. Must increase the yardage in that thorough cut as near as I can tell you, eight or ten thousand yards along there more. I may be off there a hundred yards either way.

Q. You kept no record yourself?

A. Kept no record.

Q. Anything else that occurred right in there?? Just talk about this for the time being. Was there any other thing done in here by the defendant, or its engineers? You know what I mean by engineers of defendant—to indicate that they changed the line at grade?

A. They changed—they put that through where the change was made. They made the work right there where the change was made.

Q. What I want you to tell the Court now—we realize the fact that they changed the grade and you made a longer cut? Did they do anything else in there?

A. I don't understand your question.

Q. You say the profile shows originally the road-

bed ran up here. Now, you say they straightened it out, and put it down here, somewhere about Station 350. At that point you say they lowered the roadbed, or lowered the grade in some way. Is that correct?

A. I couldn't tell you about laying the grade. Had a new location altogether, thrown up the hill. When thrown up the hill, it made a bigger cut. Whether lowered the grade or not, I don't know. I wasn't there.

Q. Did they set any stakes at this point, showing the center line that you were to follow?

A. Run center line, clear the right of way and stakes across that.

Q. When you went in to do this work, were there any stakes upthere to show where your center line was?

COURT: Did you trace out the original line as staked out by the engineer?

A. Yes, sir.

COURT: And did you trace out the new line as you say staked by the engineer?

A. Yes, your Honor.

COURT: How far apart were the marks?

A. In about the middle of this cut the right of way didn't connect with the right of way. We had cleared the first location.

Q. How far apart were the two lines? About, approximately, how many feet?

A. I couldn't tell you exactly how many.

COURT: I don't suppose you could exactly.

Maybe somebody else can. Twenty feet, thirty feet, fifty?

A. The right of way through there was around sixty feet, as near as my knowledge, and it was clear off. That is, about thirty feet, thirty or forty feet up the hill farther from the right of way. Didn't connect with the other right of way, not the middle part of that cut at all.

COURT: That is where the line was staked out?

A. Yes, sir.

COURT: That will be about sixty feet.

A. Your Honor, we had a right of way cleared at that point where we made the change, and then had to do new right of way altogether. The right of way we already had cleared wasn't any good at all. We had to clear a new one.

MR. DOBSON: Did he make that clear to your Honor?

COURT: No.

Q. The point the Court wants to know——

COURT: He said he placed the original line as staked out by the engineer, where they put in the engineer's stakes—the engineers put in the stakes?

A. Yes.

COURT: Then you traced the new line as staked by the engineer.

A. Yes.

Q. I want to know how far these two lines of stakes were apart, about how many feet?

A. Your Honor, where they first started that

change they were together, and kept swinging away from it.

COURT: How much was the widest point?

A. The farthest point from center to center, must have been a hundred feet, a good hundred feet.

COURT: How long was the change? That is, how far was it from where the change began to where the new survey came back into the old line.

A. This bridge here had a curve in.

COURT: How many feet?

A. About seventeen hundred feet where they came into the old line.

COURT: About seventeen hundred feet. Between what stations were these?

A. Station 332 to Station 349, down there. It may be off a few feet. I didn't check up.

Q. Now, you were on this work at what time, as near as you can remember?

A. I had charge of this——

COURT: That change is not mentioned in the complaint at all, is it?

MR. FREED: No, sir; it is not; I can't find it, and your Honor understood that we object to the introduction of all points not mentioned.

COURT: Yes, I understand that.

Q. Mr. Fobert, do you remember about what time you arrived at this particular part of the work?

A. At the plant, do you mean?

Q. Yes.

A. No, I haven't got the time, haven't got the date.

Q. Just go ahead and explain the next point where you had to do more extra building because the line was changed?

A. From Station 365 along there. I may be off a few hundred feet either way; 365 up to Station 375 was changed again.

Q. Just explain to the Court what the changes were, and how do you know they were made.

A. I already had—I had some men working grade, at the grade over here when they made the change; was a little bit of side hill out there, and when they made the change they cut that out altogether. Just a little bit of it, not much—that part didn't change the work very much; changed it some, but not very much.

Q. That is, you mean to say, that at the time they changed the line you had already completed it?

A. No, sir.

Q. I mean you had done some work there. You had done some work at this point?

A. I was working where they changed it. That is where the change came in right where the men were working.

Q. Had the men done any work at the time they made the change?

A. We had done work, but what work we done was all right. The change didn't destroy the work any because just about started on the line.

Q. What change did they make there that caused you to do more work?

Q. At Station 430, along there there was—I may

be a few hundred feet off there, but there was some change made.

Q. Now, you say you may be off a few hundred feet?

A. I may be off more than that. I didn't check.

Q. Can't you identify it a little better?

A. I could identify it by this cut here, your Honor.

Q. Were there any changes about where these cuts were made on the map?

A. This cut was figured here, and this cut over here, where it shows a cut was no cut at all.

COURT: What station is that?

A. Station 434 plus.

COURT: 434 to what?

A. There was some change in the way there. I couldn't tell you.

Q. And you were there practically every day, were you?

A. There all the time, every day and all day.

Q. And you know that there was some increased work?

A. Yes, sir.

Q. That is, you had extra work to do because you had to go in these cuts, and put your dinky cars in there and haul material out?

A. Yes, sir.

Q. What the Court is interested in here is to find out how many of these changes were made, and whether that was due to the fact that they changed the line of the roadbed, that is to say, changed the

center line up or down, or one way or another. That is what we want to find out here.

A. This line was changed up the hill all along from station—along station 430, along there.

Q. How far did that continue?

A. It went up about station 446—five or six, I think along there. There was some straightening done there, better roadbed. Straightened the line up in the heavy hill, heavy cut.

Q. Now, what you said, as I understand, and I think the Court understands, there are three things, or at least two things that would indicate they changed the grade. In other words, that showed they changed the grade. One would be that you had to make thorough cuts. You know what I mean by thorough cuts. Another thing would indicate they made the change, would be the manner in which they had their stakes set. As I understand they originally, when this line was located, they set the stakes along a line showing where the line should be constructed?

A. Yes.

Q. Now, if they departed from that, or changed that, they would set those stakes at some other point. What the Court would like to find out, and what I want to know, is how many places they did that, or you say that was done?

A. At this certain place over here they needed material. This cut was taken out by hand and after the cut was taken out by hand they were short of material for fill, and I got that shovel and I put the

shovel at this point and widened this point to get material to finish that dump back. The dump was not wide enough.

Q. Was that due to some change they had made in the roadbed?

A. Yes, sir.

Q. What was that change?

A. They changed to make a better roadbed.

Q. In what way? Was that because they moved the roadbed to the right or left?

A. They moved it up the hill; they couldn't go down any lower.

Q. The point is, did they do it? That is what I want to get at. Did they move up the hill?

A. They moved up the hill.

Q. And that was the change you referred to?

A. Yes, sir.

Q. Where was that you say? At what station?

A. This at station—between station about 430, along there, up to 446, along there.

Q. Now, that takes in how many cuts there?

A. One, two, three, this shows a cut here; they changed; another cut where change was made.

Q. They eliminated one cut?

A. This actually shows up higher than this one. That is one, two, three, thirteen foot cut here. And this grade, what they now changed. Only shows grade at top of cut, and this cut is bigger, and the next one is bigger.

Q. They made a change in such a way that they moved the roadbed up the hill at this first cut. This

cut at about station 431, is it not? Now, did they do anything else there, which shows you that they changed the grade of the roadbed?

A. They made a fill; the fill was bigger. The cut was bigger.

Q. How would the fact that the fill was greater indicate that they changed the roadbed, changed the alignment?

A. How would it show?

Q. Yes, how would that show? You said that the fill was greater here—that was one of the things. How would the fact that this fill was greater show it, tell the court here, that they had changed the line of the road bed?

A. How would it be done, you say? How did they change it?

Q. No, how that would cause—or how would that indicate that they had changed this line, the road bed to the right or to the left? You understand what I mean?

A. They changed it for a better road.

Q. We understand, Mr. Fobert, that they changed the road bed, from what you say, but what I am trying to get at is to have you tell the court whether the way you knew they changed it was because they had set stakes indicating that line was moved this way or that.

A. Yes, had stakes.

Q. Did you see the stakes at this time indicating where the original road bed was to be. Do you know what I mean by original?

A. Original, in the first place.

Q. Yes. Now, there were stakes there the first time you went on this work to make this cut, showing where the center line of that road bed was?

A. I was very—

Q. I am speaking of the time you were there.

A. Had to be there to see the location.

Q. Were they there?

A. Yes, there were stakes there.

Q. And you saw them?

A. Saw them; didn't see them all; I saw some stakes.

Q. Did they change these stakes while you were there?

A. This right of way?

Q. I mean here at this point, right there at that point, those stakes one way or the other?

A. You mean the center line stakes?

Q. Yes,

A. Yes, up the hill.

Q. When did they change those?

A. I couldn't tell you.

Q. You say that the road bed was moved further up the hill. Now, if they moved it further up the hill—

A. Not the road bed, the line.

Q. Wouldn't they set stakes to indicate where it was to go?

A. Yes.

Q. And didn't you proceed on your work there

as indicated and shown by those stakes? For instance, you saw stakes set here.

A. Was stakes set for this line before it was cleared, I saw those stakes.

Q. Now, then, they moved those stakes?

A. They run a new line.

Q. And they set stakes to show where that new line was, didn't they?

A. Yes, sir.

Q. And you saw those stakes?

A. Saw the stakes.

Q. And you knew then from that that they were moved from the original point?

A. Yes, sir.

Q. Moved further up the hill?

A. Further up the hill.

Q. Now, they had to set the stakes further up the hill before you would know where to go through with the steam shovel, wouldn't you?

A. This cut here—

Q. In other words, in going through this cut with the steam shovel, you would follow the stakes, wouldn't you?

A. This was done by hand, this one cut there.

Q. Well, if done by hand, you would have to follow the stakes, wouldn't you?

A. Follow the cross section through before you grade.

Q. What do you mean by cross section?

A. They put stick on each side, one in the mid-

dle every fifty feet. They put a mark on the stick the depth of cut.

Q. When they cross sectioned this part of the work, you say you saw that stake at some point; was that stake at the same point it was when you first saw this work?

A. I didn't check it up.

Q. You can't say, then, they moved the road?

A. I wasn't there to check it. I don't remember. I just had to follow their stakes. When they gave me stakes, we were to follow.

Q. Then the only way you know they made the change there is the fact you went further up into the hill?

A. Yes, sir.

Q. How do you know you were getting further up into the hill than they originally planned, if you hadn't seen the stakes where the original center line was?

A. One way I can tell, this cut here was also taken out by hand, ready for the steam shovel; light cut; already for the steam shovel to come through; also I had my dinky track; had graded around every one of these points here, these little cuts all graded by hand to take the truck down; when the shovel got there we could get to work at once; that is how I know they threw the track up there. When I got in with my shovel, I put the shovel in this cut where already taken out by hand, put on hillside, and took out more material and finish; put my fill in and finished up.

Q. You mean to say before you put your steam shovel through there, you had been through there by hand?

A. Yes, sir.

Q. When you came along with the steam shovel, you had to widen those cuts, is that what you mean?

A. Yes, sir, this one here had to be widened.

Q. Why was that?

A. Borrow.

Q. Why did you have to widen?

A. Borrowed there to put in fill.

MR. FREED: What station that you had to widen?

MR. DOBSON: That is about 435, I would say.

A. 434—433 plus, right here where the fill is.

Q. About 433. Now, I understand, Mr. Fo-
bert, you had gone through here then from Station
430 and to what station, where?

A. What are you getting at?

Q. This handwork you claim.

A. This was hand work right here.

Q. Up to 440, is that correct?

A. Yes.

Q. And you had finished that in there by hand,
according to the stakes that had been set out?

A. Yes, according to the engineer's stakes.

Q. In advance of your work?

A. Yes.

Q. And after you had done that, you came along
with the steam shovel, is that correct?

A. Yes.

Q. What did you do with the steam shovel in here?

A. I put the steam shovel in here, and borrowed material to finish this here.

Q. Why did you do that?

A. Was ordered by the engineer.

Q. Was it because of some change in here?

A. This dump was put in just wide enough to get the shovel across from these hand cuts.

Q. Did they set stakes after you had gone through here and opened up these cuts by hand; did they go through there and set stakes to indicate they would change the line a little further or move up the hill a little bit?

A. After we went through?

Q. By hand, yes.

A. The line was changed, yes.

Q. That is the reason you took the steam shovel plant in there and widened that out; is that true?

A. Took the steam shovel in there, and took out the rest of this cut up the gulch to here.

Q. You are going up to Station—

A. Here is the fill about 447 plus. This cut over here, that shows grade here. When we changed throwing the line up hill it shows a cut; shows a grade here, and when they swung line up the hill, made a cut.

Q. We understand, Mr. Fobert, that you are stating repeatedly here that they threw the line further up the hill, but what the court don't know,

and what I don't know, is how you know that wasn't the original location of that road bed.

A. I already told you, Mr. Dobson, this cut was taken out by hand, according to the engineer's stakes, up to the slope stake. We had the fill just wide enough, about seven foot cut, just wide enough bridge to get the shovel across, swing her in there to finish that fill, and what material—after this fill was finished, the rest of the material, these cuts, these two cuts, where this change was made, went into this fill here.

Q. I understand that perfectly, Mr. Fobert, that there was a change made there, but what we are trying to get at is what you saw there that indicated that change was made. The thing that I would suppose you would have seen was this: that they had stakes first set out on the original—you know what I mean by original—center line; later they set out their stakes in that original line to some other point. That is what the court wants to know, whether they did that.

A. The first location here they was keeping out on the edge of the hill, the curve. When they borrowed along there, the material was to come out of this cut. There wasn't enough to make the fill. They went to work and swing up the hill, put the shovel in the hill, and borrow enough to make the fill ahead. This fill over here at Station 447 plus. After this material was taken out of here, there was enough material; these curves all cut out; they put their track through there.

COURT: Did they take the material out of these cuts because of the change in the line, or for the purpose of making the fill?

A. For the purpose of making the fill. They are supposed to be to grade.

Q. Then, Mr. Fobert, it was not due to the fact that they had moved the line up or down the hill. Is that correct?

A. Moved the line up the hill, into the hill.

COURT: They moved the line into the hill after you had taken out the material to make the fill?

A. They had the road bed.

Q. Now, let's pass for the time being up on to some of these other cuts. We have one around Station 450. Start at Station 450 and just explain.

A. Station 456 somewhere along there, there was another change made after I had my light dump, after this little dump was built by hand.

Q. Was that dump the fill?

A. I mean fill. This little fill was put in by hand, and my dinky track, on narrow side cut below that material and haul; was grade around these cuts, and they changed it up the hill, made bigger work, bigger cut, straightened the road bed in here.

Q. That is to say after you had gone through there and made your grade, established your grade?

A. Not the grade, not the original grade; that is for the dinky, the car we was hauling material out there.

Q. You had gone in ahead and put in your dinky cars, and you put in your dinky cars at a point where

the stakes indicated or showed you they were going to build the road bed.

A. Yes, the cross section stakes.

Q. And as I understand you you had done some preparatory work, is that it?

A. Yes, sir.

Q. After you had done that you say they came along and changed it; moved up further into the hill.

A. Further into the hill.

Q. What did that cause you to do? What did you do when they did that? What did you have to do when they did that? What additional work?

A. I had to dig—give them more material; that is all the difference it made, give more material.

Q. Did what?

A. Increased the yardage, made bigger cut.

COURT: How did it affect your dinky track?

A. Didn't affect the dinky track any at a certain point; the hill was steep, didn't have to be up the hill much to make heavy work. Here is Station 463, 464 about; it shows trestle here; a fill; this trestle was cut out. The line was thrown out toward the river there, made a bigger fill and cut at Station 460. That was a bigger cut. That was a bigger cut up the hill, and the cut shows here to be a six foot cut here. It was about—the change made it about—the first change it made it about from 40 to 81 foot cut on the high side. Profile shows six foot cut.

Q. In other words, they moved the road bed at this point, referring to Station 467.

A. This cut here, 467, up to four—this cut is

only 150 feet long as shown on this profile, six foot cut.

Q. Station 466, then, we will say up to about 469; is that it?

A. Yes, sir.

Q. That cut, you say they moved that in such a way—

A. They threw it up the hill to straighten the curve.

Q. I understand you to say they increased that cut from 40 to 80 feet?

A. Yes, sir.

Q. On the height or length?

A. In height on the high side.

COURT: You mean a bank of 80 feet?

A. Yes, it shows fill here of 13 feet; this profile shows fill here.

COURT: We are talking about cut.

A. This is cut. I want to show you this cut,—is a fill now; in the new change it is cut. This profile shows fill about 13 feet at Station 470, and at Station 474 it shows grade. At Station 475 between 475 and 476 it shows eight foot of a cut here. About 75 long,—seven foot high. One side of this fill in there at Station 470—it is a cut right opposite that fill; it is a cut, I should judge, I didn't measure it, I have seen the stakes, but I don't remember the stakes; as near, as close as I can get now, would be a cut of about 18 or 20 feet, maybe better.

COURT: In place of a fill?

A. In place of a fill.

COURT: Was that because they moved the road up the hill or down the hill?

A. They moved it up the hill.

Q. In other words, instead of crossing at the gulch there they moved it up against the side of the hill?

A. They made a bigger fill. They moved out the fill.

Q. I thought you said they done away with that fill?

A. Done away with this bridge.

COURT: You said a moment ago there was a cut where the profile shows a fill.

A. It is, your Honor, this cut there; as I told you a moment ago, is a cut there of 20, maybe more.

Q. What do you mean by a fill there?

A. This profile shows a fill of 13 feet.

COURT: Ddi you put in the fill?

A. No, was a cut instead of a fill.

Q. I don't believe the court understands how you can change a fill to a cut.

A. I didn't change it; the engineer changed it.

Q. How do they do that?

A. The engineer done that work.

Q. How could they do it? How could they change that?

A. I wasn't there to check the engineer.

COURT: You know the contour line there. How did they get a cut where the profile shows a fill?

A. They wanted to cut some of these curves, I

expect. They have to have almost a straight road there instead of all those curves.

Q. I wish you would listen to what the court asks you. The court didn't ask you that. The court asked you what they did there to change this from a fill to a cut. It isn't a question who had the right to do it. It is a question, what did they do?

A. I don't understand it. I can't catch that. I show you where—

COURT: I understand the profile at a certain place shows a fill. Now, you say that was changed to a cut?

A. A cut.

COURT: Where was the cut located with reference to the fill?

A. Just moved up the hill.

COURT: How far up the hill?

A. I can't just remember how far, your Honor.

Q. Now, Mr. Fobert, you say—where is this map—470, isn't it? Now, that profile, through looking at the profile you would say that that line dropping down that fashion would indicate that was a fill; would have marked a fill there from looking at this profile.

A. Yes, sir.

Q. You were on this ground?

A. Yes, sir.

Q. As a matter of fact, was that a fill there?

A. Yes, the profile shows.

Q. No, you were on the ground, weren't you?

A. Yes.

Q. Was that a fill? In other words, did this profile state or show the real condition, show that it was a fill? Was it a fill, in fact?

A. Yes, the profile shows a fill.

Q. Was it a fill?

A. No.

Q. In other words, was no hollow in the ground there, is that it?

A. Hollow? Where I put the grade in? Not where I put the grade in.

Q. The road bed runs along here, indicating at point 470 that the road bed ran over a hollow here; in other words, you have to make a fill to hold up the road bed. Now, was this road bed moved up here somewhere?

A. Moved up.

Q. In other words, they changed the center line of the road bed up the hill?

A. Yes.

Q. And in doing this, they got away from this fill; is that correct?

A. Yes, you get away from this fill, get away from the bridges; take out the bridges, and put in fills to take the place of bridges.

Q. Now, Mr. Fobert, if you can, I wish you would just get yourself together a little bit. You have been in this line of work a good many years, haven't you?

A. Yes.

Q. When you go out upon a piece of work to

build a road bed or a railroad, you always work under the directions of an engineer, don't you?

A. Yes.

Q. This engineer isn't always right at the point where you are working, is he?

A. No.

Q. How do you know what he wants you to do?

A. Stakes on the ground; have to follow his stakes. He starts you out and stakes in the ground; have to follow his stakes.

Q. If that is a fact, there must have been some stakes at this point up about Station 470, when you went on this work, wouldn't there, some place in there?

A. Yes, sure there was. Couldn't have worked without stakes.

Q. Where were they? Were they on the line? Could you tell by the stakes that were still there when you first went up there, if that was to be a fill or a cut? What did the stakes indicate?

A. Through here?

Q. Yes, what did the stakes show you? Would the stakes tell you what to do there when you first went up there?

A. The first location through there—

Q. Let's don't get away; let's get right back; you went right here to this point to do the work of building this road bed, and there were stakes right here, 470, about that, to indicate or tell you what you were to do?

A. Yes.

Q. Where were those stakes? Did they tell you that you had to make a fill there? Did those stakes tell you?

A. No, never seen that fill.

Q. Well, you were on the ground here, weren't you?

A. Yes, sir.

Q. And you just testified that they changed this from a fill to a cut. Now, you say you never saw the fill.

A. I never saw that fill in the cross section.

Q. You mean you never saw the cross section of it?

A. When they run a line, locate line, it isn't cross section there; cross section is set on grade work. When the cross section is in, that is what you have to go by, the grade. This place right here, the line was changed about three times. 470, about the middle of the cut shows in here; this line was changed through there, and thrown up the hill. Was thrown up too far; one stake was up 81 feet, one stake. So they moved it back down again.

COURT: Cut the 81 feet?

A. Just one point slope. The hill went up almost as steep as the slope. They didn't throw that cut all over, just one point; steep side hill, as steep as a man could walk. And afterwards they cut there, swung down the hill a little more; then we took the material and put back in the fill—finished fill 464, and some of the material went to fill 476 and 477. So it took what material there was in that cut in these

two fills; took all the material there was in those two cuts to make those two fills; instead of being fill here there was no fill there; it is cut, solid cut.

Q. Was that beyond the point we are just talking about?

A. Just the same point.

MR. DOBSON: Does the court understand it now?

COURT: I am not sure whether I do or not.

Q. I will ask you one more question. When do they set these cross section stakes?

A. The first location of this profile. This cut here was mostly side hill; we cut here, throw in that fill, and this line here is into the hill over eight feet in the center line; that is side of the dump, very little fill, very short, and on the low side of the center, about 40 foot, throw that dump 40 feet. It wasn't long. It went around the hill like this, and this cut here is about six foot cut, while the low side would be a little bit, maybe little bit of a fill to the grade, the highest point of this cut. You see that was intended for side work, and this way shows that fill is here, this line, instead of this dump; might be just level. The side of this dump don't show to take a fill. The low side of that dump would be bigger fill.

COURT: Follow along the contour of the mountains?

A. Yes.

COURT: The side of the mountains?

A. Yes.

Q. Is that what they did there, they followed around the side of the mountain?

A. That is what this profile shows.

Q. What they did is what I want to know.

COURT: Not what the profile shows, but what you actually did, what work you put in. You say there was a change there.

A. There was a change there, was a bigger fill, bigger cut, and they had to throw the line up the hill to make a better line, to straighten their road, and throw a bigger fill and bigger cut. The cut was bigger, and across this hill was a bigger fill.

Q. What you have just been talking about, Mr. Fobert, is between what station? Here is the fill you are talking about?

A. Yes.

Q. That is between stations—

A. Between Stations 462, somewhere along there, and Station 476—cut.

Q. The profile, as I understand it, indicated you were going to merely follow the contour of the hills; is that correct?

A. Yes, sir.

Q. You didn't do that. That is, you moved—the line was moved up further into the hill.

A. Further into the hill.

Q. Let's pass on from 470 and see if you can tell the court what happened beyond this point.

A. From Station 477 to Station 480, it shows on the center line about a four foot cut. The line was thrown up the hill, made a bigger cut, thorough cut;

and at Station 480—481, the profile shows trestle here, one span and a fill. This trestle was fill. Instead of trestle they cut the trestle out, and it was a fill. And from Station 480 across that trestle to be built, that cut was increased from six foot cut—I may be higher—there was an increase there, but I don't remember the height of it. It was thrown up the hill all along here, because it shows a little fill along here; shows three cuts here, and was thrown up the hill so it made one cut out of these three cuts; thrown into the hill further; a real steep hill.

COURT: Between what stations?

A. Between Station 480 up to Station 492.

Q. Now, then, to get this into the record a little better, the profile shows, as I understand it, two fills in there. Is that correct?

A. The profile shows two fills and three cuts.

Q. Now, I understand you to say that roadbed was changed in such a way those fills were entirely taken out, and it was all cut?

A. All cut.

Q. And as I remember it now, that necessitated hauling material out, or did you cast it over the side?

A. There was some material wasted there. Too much material in the cut.

Q. The point is this: Did you put the steam shovel in there and throw it over the side, or did you have to put your dinky and haul the material out of these cuts?

A. What material was wasted goes down hill, just goes on waste.

Q. What I am getting at, was what part of that that was not waste did you haul?

A. I hauled some of it in this haul.

Q. Then you had to put in dinky cars, didn't you, and haul some material because of that change?

A. Yes, sir.

Q. Would you have had to do that if they hadn't made this change? Suppose they had built it just as the profile shows, would you have had to put your steam shovel in and haul the material back and forth?

A. No, wouldn't have had to haul. This material would have been cast altogether, wouldn't have had to have any car and track at all, this piece here.

COURT: How would you have made your fill?

A. Shovel; throw it over. It was half and half, your Honor.

COURT: Take out of the cut and put in the fill?

A. Was half and half.

Q. That isn't exactly it. Can you give a little diagram how they make the fill without hauling material? Just show the court how they make the fill without having to take out the cuts and hauling.

A. Say this is side cut here. This is the width of the roadbed, about half; at this cut here, and where it shows these fills here will be a little cut, little bit of light cut; run into little bit of light cut on every side. Of course finish the work with steam shovel; do it all and bring it back; done to have car and track and engine and engineer and brakeman and dump field, and lay your track.

Q. See if I can get this clear in the record. These

fills indicated by profile at Station about 485 and 489, those are along close to the contour of the hill-side, is that right?

A. Yes, sir.

Q. And running your steam shovel along there you would take the material along the side of the hill and drop it down into this fill?

A. Yes.

Q. When this work was changed you couldn't do that?

A. You couldn't do that. Have to do as the engineer tells you.

Q. No, that isn't what I mean. As a matter of fact on this piece of work you didn't do the work as you now describe it to the court, but have to haul material back to make these fills?

A. Made these fills wherever the material required from the cut hauled these cuts back for this fill here.

Q. You hauled the material back from these cuts because of the change in the line?

A. Yes, sir.

Q. And made these fills which you planned on filling on taking the steam shovel back to clear up above, and drop over the fill? Is that correct?

A. From this cut to this fill here was some waste here.

Q. Beyond this point, that is Station 490, just tell the Court what if any changes were made up there, and what your work was increased, if any.

A. From Station 491 another change in this cut.

This cut only shows about ten or twelve foot cut—about twelve foot cut at highest place; that cut was thrown up the hill and made a bigger cut; made a thorough cut, instead of an open cut on the lower side; made an open cut on the lower side; might have been highest point of that cut on the lowest side, one foot cut; fill a short distance. When this change was made here, we had this small little cut here, just scratch work, just ballast stuff and leveled off; had a little piece of work done, not very much, had men at work about one day or day and a half, somewhere along there. They went to work and raised the grade, made a fill; where it shows a little cut is a fill.

Q. What did you have to do to make that fill?

A. Hauled material from this cut.

Q. Was that shown or indicated by the profile? Could you tell from the profile you would have to do that?

A. Tell the profile, you say. What do you mean?

Q. You say they made a change there, and you had to make a fill there you hadn't expected to make. In other words, from the profile you wouldn't say would have to make that fill or haul material.

A. The profile shows only just a little bit of thing. When they raised the grade, it threw this line up the hill, higher, made a bigger cut. I expected to straighten up the grade—I don't know—curved. They raised the grade to take care of some material.

Q. Then you had to haul material to make the fill, is that it?

A. Had to haul material to make the fill. This

fill here, where it says to be four foot fill here, was all in by hand.

Q. You had already done that?

A. We had already done that.

Q. Then they came along and changed that afterwards?

A. And raised it, wasn't filled though; they raised the fill there and made it higher, and that material was in the fill; of course we took it out of the cut; where had to be filled, we took it out of the cut.

Q. Took it out of what cut?

A. Took it out of this cut.

Q. That is about Station 499?

A. Took it out of this cut here. This cut shows here about four foot cut on the center line. The line was changed all over, thrown up the hill all over; made this cut bigger.

Q. How much bigger, about?

A. Not so very much bigger, some of them.

Q. Approximately about how many feet up the hill?

A. This cut here was—pretty near, not much different than what shows here. They threw it up the hill, and the hill was not very high; and they raised the grade so it threw the cut up, the same thing.

Q. Cut about the same amount of material?

A. The cut was about the same. Might have been a little more; might have been just exactly the same; very little. It looks, the work done in this

here about the same. Isn't the same line. Been moved up the hill. Now, here this cut—this fill here there was another change—

Q. That is Station what?

A. From Station 513, along there, 512 or 513, along there, this little cut here was out by hand, just scratched a little bit, didn't amount to nothing, a foot around there, for about 200 feet, averaged about a foot cut—was done, done by hand.

Q. Then what happened?

A. This fill here I had my trestle in; trestle is the temporary trestle for my dinky car to haul the material for dumping this fill to build up the grade, for dinky cars or dirt cars to haul the material to make the fill. I had the bed in, Johnson come along and changed the grade again.

Q. Who was Mr. Johnson?

A. The engineer on the work.

Q. How much did he change it?

A. He changed it about Station 512—513 close, and cut it down. Made a stiffer grade here to cut the yardage down.

Q. How much did he cut it down?

A. I had a trestle there up, oh, I should judge the highest part of that fill there—you can't go by that profile there—shows a fill, but don't give exactly as had it there, but I should judge eight foot fill at the deepest part of it; from nothing to eight foot fill.

Q. Nothing to eight feet. How much did he change it?

A. How long, you mean?

Q. No, up and down how much?

A. At that time he just lowered the grade.

Q. How much? How much did he lower it?

A. I had to take my trestle down and cut it more than half, a little better than half. The trestle was too high.

COURT: How many feet? How high was your trestle?

A. The highest point I had there was about eight or nine feet.

COURT: To cut it in two would take it down about four feet?

A. Take it down about four feet.

Q. That was done after you built the trestle?

A. The trestle was built, some stringers on there, not all of them, but some stringers on them.

Q. Anything else pertaining to that?

A. Now, this cut here shows trestle here; where it shows trestle here it was a fill. This cut here was a thorough cut. This profile shows the line here where located, a side cut.

Q. In other words, the profile indicates you would simply dump the material over the side? Is that right?

A. This material here.

Q. Yes, you would throw it over the side according to profile?

A. Not this cut. This cut had to be hauled out. You had a nice grade for your dinky track on the grade your grade went in there; I had a good grade convenient for to take out. This cut was thrown up

the hill, and made a thorough cut. And they wanted every bit of that material for the fill; supposed to balance the fill. I had to build my temporary trestle strong enough to carry my shovel over—shovel about eighty tons. It gave a little extra work. I used the trestle, the same trestle for dumping dirt to fill the fill. Answered both purposes. Had to be there anyway, only not quite so strong. Some of that material went in here, mostly all of it, some of it; did take some of it by hand, thrown away. Cut 524 to 527 plus, was a very mean cut for the steam shovel, was as mean as you could lay a cut for a steam shovel; stood straight up and down. Took a lot of work to grade an incline for the dinky so we could get up; we couldn't handle as many cars; we could only handle one train because the grade was too steep.

Q. Was that situation due to any changes that were made?

A. That was due to the change. Was fine steam shovel cut before the change.

Q. Was what?

A. Was good steam shovel cut before the change; was just as mean a cut as I ever done in all my railroading; was gravel and solid rock, and you didn't know was solid rock until you dug into it. Was a mean cut for the steam shovel.

MR. FREED: You say you couldn't tell it was solid rock until you dug into it?

A. Solid rock would be covered with cement gravel; was very sharp little cut.

Q. Mr. Fobert, do I understand—would that have been a mean cut before they made the change?

A. Would have been a fine cut before the change was made, nice cut.

Q. They moved further into that hill and made a mean cut; that is what you say?

A. I don't mean they moved it for anything like that, but the engineer on the work don't look out for your work; he looks out for his own work.

Q. I understand that, but the fact is because they did move it made it a very difficult piece of work?

A. Yes, a very mean piece of work and might cost a little more.

Q. About how long were you in that cut, just as you remember, approximately; you don't have to fix the exact number of days. I want to give the Court some idea of approximately how long you were there?

A. About, oh, maybe eight days—eight or ten; I wouldn't say exactly that; I didn't keep track of it.

Q. That is as near as you could tell?

A. I knew then; after the cut was done I could tell you exactly how long was there.

Q. How long would it have taken you to make that cut if they hadn't made the change; about how long?

A. A day-and-a-half; two days. There wasn't as much yardage in it before the change.

Q. And the increased yardage, together with the increased difficulty took a longer time?

A. Yes, sir.

Q. Now, Mr. Fobert, anything else to say about that?

A. Down at this one?

Q. What happened after that?

A. This cut here—here is another mean cut for steam shovel, awful mean. It's so straight here, your Honor, you can't walk up.

COURT: Where is that?

A. At station 538; no, just a moment; that is fill and cut both; from station 535 to 538, the length of this cut, there is a hundred feet straight up and down.

COURT: Change in the alignment there?

A. This was a side hill before the line was changed and made thorough cut; it was an embankment between that stretch; river below it. There was a strip of land not quite a hundred feet long—around a hundred feet; there was no way to haul that material out; the only way to haul that material out was to take that little point, put in the steam shovel and—make my dinky track, put in the steam shovel and kick that point out there, so I could make this fill here.

Q. You say on this point you had to kick—

A. My dinky track, I had to grade with steam shovel to make it.

Q. At station what?

A. 537.

Q. At Station 537 you had to kick out the point of a hill?

A. I had to dig this point; that was the quickest

way and the cheapest way it could be done—kick the point, that is, down out of there; the lower end below this point, to get in on the fill; just a short kick to get in on the fill; had to be done; then back up and put my track down and take it out.

Q. That was to enable you to get in with your dinky cars to haul the material out?

A. Yes, sir.

Q. About how long did that operation take approximately? You don't have to—

A. Just to kick this little point out for my dinky track for to make the cut?

Q. Just to make the cut, the whole thing?

A. Didn't take very long.

Q. Two or three days?

A. About three or four days.

Q. Was that caused by the fact that they changed the line at that point?

A. Yes, they threw it up the hill and made a bigger cut.

Q. Before that time you would simply have gone in with the steam shovel and thrown it over the side?

A. Over the side; if had to be hauled could have put the track on the grade.

Q. The change caused you to have to do this extra work to get your dinkey track in?

A. Yes, sir.

Q. Increased the difficulty of the haul?

A. Yes, sir; now from station—this little cut here was taken out by hand.

Q. That is about Station 540?

A. Not quite all of it; a little bit left; mostly taken out by hand, and this profile here shows a fill on the center line of approximately about eleven feet; well at about four feet from that center line—two feet from that center line would be about forty feet straight down to the river, so that line was—must be the reason they threw the line up the hill; this profile here shows cut about one foot up from center line; quite a little side hill cut, not far back, a little bit up the hill, so we went along with the shovel from that point, and cast it over. And over here, up to this, I guess this cut over but not—took the full width of the grade. You see this place here where the cave in. Dirt sometimes comes down and caves right in; sometimes have a slide in a cut of 50 to 500 yards. All at once lets go in the hill and comes down; was some in that cut, been some slide right along there.

Q. Did that happen in there while you were at work?

A. Around in there; some came down; not that much, but some few yards came down there, two or three hundred yards slide, in more than what the stake calls for; we went on through here and made this fill where it shows the fill here, and there was a little fill there, was a little cut up here, very little. I got enough material here to make that fill, so I wouldn't have to bother with any car and track.

Q. Were there any changes made, referring to fill at Station 545 to 550. This cut here, were any changes made in the line there?

A. They connected in there; the change back here would connect, in here some place.

Q. They went up to the original line? About that time?

A. At this place where they explained awhile ago there was close to the river, was thrown up the river. They didn't go over there, was a sharp curve in there. They connected some place in there; I couldn't tell just where. In here it shows this fill just about the same as this profile shows. I don't think changed at that one point. The side hill was very light cut, just like this, about that much instead of following that. I took this material there with steam shovel and put it in and borrowed a little bit to make the fill as I went along.

Q. That is shown in the profile, isn't it?

A. Yes, shows here.

Q. What I want to get at is the changes.

A. Here at Station—I started to take that dinky track and the cars. I was going ahead. I dug a track around there with my shovel.

COURT: Around where?

A. Around this cut. It is Station 555 to 557, shows a cut on the lower side of this. Took some material that was in that cut and throw to one side because was a very light fill to be made here. I was grading my dinky track with shovel on grade to make it, had to grade instead of being by hand. Placed me ahead on shovel; other places too much work to do. That place had shovel in. Ordered to close down right there.

Q. That is the end of the work?

A. That is the end of the shovel work. Shovel work closed down at 567, I believe is the exact number—that is where the shovel was ordered to close down.

Q. From that point you left the work?

A. There was work done ahead by hand.

Q. That was by your company?

A. Yes, was some of it light work.

Q. Did you have anything to do with that?

A. That is the same as the other.

Q. Were there any changes made in the line that affected that work that you did by hand on above?

A. There was a little bit of work done there, light cut; after the grade was completed, the grade was changed; very easy to make that; started to run the line up and down more from that point on.

Q. Mr. Fobert, were you ever up on that work after you were ordered to move off?

A. We had to move our outfit.

Q. You moved your outfit?

A. Had orders to move our outfit.

CROSS EXAMINATION

Questions by Mr. Freed:

Q. Mr. Fobert, you spoke of changes that were made that caused these different excavations. You understand what I mean? You spoke of changes?

A. Yes.

Q. You don't mean to tell the court that our engineer had this line staked out, had his cross sec-

tion stakes in, and then picked them up and changed them, do you?

A. In places, yes.

Q. That is what you mean?

A. Yes, in places; not all over.

Q. How much of this change was that? I don't care to go through it.

A. Not very much.

Q. Wasn't very much of that?

A. Not what had cross sections there.

Q. Not very much?

A. Quite a little bit; not all of it.

Q. If you can, tell us how much, what proportion, whether a half, a third, or a fourth, or a fifth, that you refer to were changes after the cross section stakes had been put in the ground?

A. After the cross section stakes were put in the ground?

Q. I will ask you how much change would that mean. I am not asking you to give it to me in yards, or anything like that, but whether one-half, one-third, one-fourth or one-fifth of the changes.

A. You mean after the work was cross sectioned, how much of that work was changed?

Q. Yes.

A. And how much work was done on it; was that the idea?

Q. No, sir.

A. Just the change.

COURT: How many changes were made after the cross section stakes were first set? How many

changes were made in the road, and new cross section stakes set.

A. From Station 466 to Station 475, about; that is, there was no work done.

Q. What is that?

A. There was no work done on that cut; was cross sectioned but no work done.

COURT: Cross section stakes set, but no work had been done.

A. Cross section stakes set, but no work done, then they picked up these cross stakes and moved down hill; a little bit lighter, the fill.

Q. You didn't start to work on the basis of those cross section stakes?

A. No, sir.

Q. Just go on so the Court will understand.

A. Another cut over here at Station 478 to Station 480—that cut was cross sectioned, and then the stakes pulled out and moved up the hill a little more.

Q. Had you started work on that?

A. I had my dinky track in, but didn't affect the dinky track at all.

Q. The fact that it was changed after cross sectioned, didn't affect your work?

A. Not that change.

Q. Just proceed.

A. From Station 481 to Station 492, shows three cuts here. I had my track, already had my dinky track graded on the low side, very little work to do on grade to put these three little cuts in these three little fills.

Q. Were the cross section stakes in?

A. Cross section.

Q. And after the cross section stakes were in, and you started to work on that basis, they were moved. Is that what you mean to say?

A. They were moved up the hill a little bit.

Q. How far?

A. Not very far; couldn't go far.

Q. Could you tell the court how far the alignment of this railroad was changed at that point?

A. Might have been—the grade might have been moved up here six or eight feet, somewhere along there; in places maybe not that much; in places more than that.

Q. At that point, Mr. Fobert, how far ahead of you was the change made? You understand what I mean?

A. Yes.

Q. You were working along here, for instance.

A. Yes.

Q. And that line is the point you were speaking of? How far from that were you when the change referred to in the cross section was made?

A. This change was made far enough ahead it didn't delay me.

Q. Didn't affect you very much?

A. Not very much; had a little work done on the track but didn't affect me very much.

Q. What station is that?

A. From Station 481 to about 492, along there.

Increased the yardage a whole lot, but didn't hurt the work I had done.

Q. It merely meant, when you came to it, you moved more material?

A. I didn't move more material; was a little bit cast on this certain point here; material here that I had no place to put.

Q. What I mean to say, we didn't deceive you. You didn't start work on the basis of this cross section, and then have a change to throw you out?

A. Sir?

Q. You said at that point, these two stations, 481, isn't it, to 492—you said between these two points after the cross section stakes had been put down, they were pulled up and thrown further up the hill. That is a fact?

A. Yes.

Q. And I believe you said were thrown up six or seven feet, didn't you?

A. Somewhere along there. I may be off a foot some way. That is just as near as I could. I didn't check that engineer, I wasn't there for that purpose.

Q. Now, I am asking you whether or not the moving of these cross section stakes by our engineer put you to any more trouble. Now, before you answer it, what I mean by any more trouble is not that it caused you to excavate any more material.

A. It increased the yardage, gave me more work.

Q. You excavated more material?

A. Yes, sir.

Q. That is all of it?

A. Yes, sir, that change there, more work.

Q. You excavated more material?

A. More material.

Q. Now, I am asking you how far ahead of you was this change made? That was the question I illustrated here. This light is the point where the change was made. How far—you were working that way—how far distant, where were you here when Mr. Norris changed the stakes at that light?

A. How far?

Q. Yes, how far ahead of you did he make the change?

COURT: About how far?

A. This is all changed all the way up.

COURT: Where were you at work at the time of the change?

A. This is where I was at work at the time.

COURT: Where were your people at work?

A. Men in these cuts; men in these cuts taking out by hand. Lots of that work done by hand.

COURT: You mean between Station 489 and 492?

A. I say on all that.

COURT: You mean you had to carry out work between these two stations at the time the engineer changed the stakes? Did he change the stakes after you began to work on that section of the road.

A. Changed the stakes just before the shovel got there.

COURT: Just before what?

A. Before the steam shovel got there. Along that side hill we had enough graded for a dinky track. The track was already laid.

COURT: And that was before the stakes were changed?

A. Yes.

COURT: That was done before the stakes were changed?

A. Part was done before—I won't say all of it. Mostly all of it was done before the stakes were moved up the hill a little bit. Your Honor, it didn't affect my track.

COURT: Moving up the hill didn't affect your track any?

A. No, sir. It just increased the yardage; gave us more work; that is, throwed the roadbed on solid—

COURT: The only way it affected you was to increase the yardage?

A. Increased the yardage, more yardage.

Q. As we go along—you got pay for the extra work, didn't you? That is, you were paid for what work you did? If you had to excavate—if you had to dig out 50,000 yards more material because, or on account of Mr. Norris throwing the road up the hill, you got paid for that 50,000 yards?

A. I don't know if I did or not. I never had any estimate.

Q. What I mean to say was, that was supposed to count in your cost, wasn't it?

A. Supposed to.

MR. FREED: You admit that?

MR. DOBSON: No question about that.

COURT: The plaintiff got paid for all the yardage moved?

A. Was paid for some. I don't know whether paid for all or not. Never seen any estimate.

Q. Were supposed to get paid. I am not trying to tie you up that we don't owe you anything.

MR. DOBSON: He knows nothing about that.

MR. FREED: No point on that.

MR. DOBSON: You paid us from month to month for the yardage done.

Q. And that is the only way that the move bothered you any?

A. Yes.

Q. We moved the stakes. Just proceed on and tell the court about the other changes, where the change was made after the cross section stakes were put in, the same question.

A. 492, that shows a fill here. Here is a cut here on the center line that shows.

COURT: Were the cross section stakes changed there?

A. 500; from 498 to 503, cut shows on this profile, about a 12-foot cut at the center line. That was about, almost the highest part on it, on the lower side would be about a foot cut.

COURT: Were the cross section stakes there?

A. Yes.

COURT: And then changed, afterwards changed?

A. Yes, after I done some work with my dinky, took out some of that cut, this was changed and thrown up the hill.

COURT: How far?

A. About maybe 20 or 30 feet, as near as I could tell you.

COURT: Did you lose the work you had already done?

A. Yes.

Q. How much work had you done?

A. I had the men there about two or three days, somewhere along there.

Q. How many men did you have in there?

A. Quite a few men. About 12 or 15 men and the foreman.

Q. And that work you did in those two or three days then, you say didn't go towards helping get the road done? That is, the Judge asked you whether you lost it, and you said yes, and I want to know whether you mean when you say "lost it" whether that didn't become a part of the roadbed.

A. No, it was lost.

Q. There was a grade made, and just left it, is that the point?

A. Lost. Was a little bit, might have been a very little, might have been, oh, three or four days, might have been about half a day, three-fourths of a day, might caught the toe—

COURT: What?

A. Might have been half a day of this three or four days' work, of this two or three days' work

along there, as close as I could tell you. Might have been some a little bit went in, very little where they catch some of the fill; not very much; practically all lost.

Q. What kind of work was that lost? What had you been doing?

A. That was dirt and loose rock.

Q. Excavating, digging out?

A. Yes.

Q. And that change was made after the cross section stakes had been put there?

A. I was working with these men when the change was made.

Q. Who made that change?

A. Mr. Johnson, the engineer on the work.

Q. That is the assistant to Mr. Norris, isn't it?

A. Yes, sir.

Q. You were working there personally at that time?

A. Yes, sir.

Q. And he came back and told you there was to be this change?

A. Yes, sir.

Q. Well, did you tell him that you didn't favor that?

A. How do you mean favor?

Q. You just went ahead and did it?

A. Just did as he told me.

Q. You didn't object to it, did you?

A. No, sir.

Q. You didn't say it was slowing you up, or

that it was not within your contract, or anything of that kind, did you?

A. I just said too bad so much work done for nothing—that is all I said.

Q. And it wasn't a matter of your saying, "I don't want to do it" and he said "You are going to do it"?

A. I don't do that kind of work. When I work for a man I work to suit him.

Q. So you went along and did that without objection to it?

A. Yes, sir.

Q. You felt, however, you say, it was too bad?

A. Yes, sir.

Q. To lose that work?

A. It is a shame.

Q. Just go on further with the changes.

A. Station 503 to 505 there; a little bit of a cut here, very small cut.

Q. Had the cross section stakes been placed?

A. Yes. It was done; been done by hand. This little bit of cut; this cross section was graded by hand.

Q. Then what happened?

A. Put in a little bit of a fill. And after this little bit of fill was done, light work, you know doing this little bit of scratch work by hand, and after it was done the grade was raised.

Q. Would the cross section stakes show the grade?

A. Yes.

Q. You didn't lose the work, did you, that you had done before the cross section stakes were changed?

A. This was work done for nothing.

Q. How far were they moved? Was the alignment moved?

A. Throw the line up the hill and raise it up.

Q. How far up the hill?

A. Oh, that point was raised—I couldn't tell you that point. Was pretty close together, and swings up again.

Q. Just outline to the Court how far the line, as actually built was away from these cross section stakes.

A. At that certain point right there, wasn't very much difference; was pretty close together; just the grade raised.

COURT: How did you lose the work on it already done?

A. After I graded this little bit of cut down, I put in this little bit of fill, which was completed ready for the railroad track. They raised the grade, and had to fill that out again.

COURT: You just put the fill right on top of that?

A. Yes.

COURT: The work still remained there; used the work already done, and put your work on top?

A. Here is this little cut. This little cut here I wouldn't have to take this work out at all.

COURT: You filled up the cut?

A. Yes, sir.

COURT: How much did that raise it?

A. Raised about between three and four feet, somewhere along there.

COURT: How long was this cut you had to fill?

A. Not very long.

Q. How long? 100 feet?

A. 200.

Q. How much work was lost by this change of the cross section stakes?

A. At that certain point not so very much; 200 feet.

Q. How much?

A. Had about twelve men there maybe one and a half or two days at most.

Q. You lost the work you say of twelve men for a day or a day and a half. Before you go further I want to ask you one more question. Back on the change before this last one you have talked about, you told the court that you had lost some work? You remember that?

A. Yes.

Q. If you were to go out over that roadbed today at that point could you see that grading that you lost; that is, would there be any signs of it? Do you understand what I mean. Suppose I didn't believe you, just for illustration; I went out there myself and looked for it today. Could I tell by looking at it that that work—you had done some grading?

A. I can pick you up a few points there, yes.

Q. Sir?

A. I can show you some grades, yes.

Q. When were you last over this?

A. About three days ago.

Q. This week?

A. Yes.

Q. And did you see that at that time?

A. Yes, sir.

Q. What evidences of that are there? How can you tell it?

A. Quite a work I did there, the grades; quite a grading I did there.

Q. I say you can still see some of it there?

A. Some of it, not all of it; I can show you some.

Q. Just go on with the rest of the changes.

A. This shows here, about four foot cut. The cut is quite a bit bigger than that; the cut must be about ten feet.

Q. I know, but was there a change made after the cross section stakes were put in that point? What point do you refer to?

A. No, no; that was no change after the cross section, this one point.

Q. What point is that?

A. Station 507 plus to about 510. Well, this cut, that line was thrown up, the change through all along, it was changed before it was cross sectioned.

Q. How far ahead of your work was that change?

A. That was all changed.

Q. Changed before you got there?

A. Yes. How do you mean before you got there?

COURT: Before you began work at that point.

A. Yes, before we began work.

Q. The only effect of that change, the only trouble it caused you was you had to do more work?

A. At these points I show you.

Q. Just had to do more work?

A. Yes.

Q. Just proceed and tell the Court.

COURT: Referring now to the points where the cross section stakes had been set by the defendant company, as this shows, and were then changed, that is what we are talking about now. Where they had already cross sectioned the proposed line, and after they had done so, they changed it and put in new cross section stakes, if there are any such places.

A. 515 to 524 I had some between those points.

COURT: Were the cross section stakes set there?

A. Set there and work done by hand, and trestle work up, not all of it; my bent was up, some stringer on it ready to lay the track on it.

COURT: And then?

A. The grade was lowered. I had to tear my trestle down and cut it down to fit the change.

Q. That was after the cross section stakes had been put in?

A. After the cross section stakes.

Q. You had extra work to do after that? How

much extra work did you have to do on account of that change?

A. One little cut here shows 200 feet. That cut would be all of 400 or 500. Average about two foot depth along there was taken out.

COURT: About two feet taken out by reason of the stakes being set?

A. Was taken out of the first cross section, and that material was put in the fill. Well, they backed up—only cut down the grade at the start about 514,—somewhere along there, maybe off a hundred feet; where we first started didn't make very much—didn't start very heavy on the start; that was on a dump. Little bit taken out of a dump, not very much, very little; made that cut again; already taken out.

Q. Can you tell the court, without going over it, about how many days work you lost so that you won't have to go all over it unless you want to?

A. Well, I want to be particular to tell the truth as near as I can about this.

Q. I haven't any objection to your going over it; I just thought to save time.

COURT: How many days work did it take to lower this grade?

A. Well, I was already with my shovel—the steam shovel was already to start to fill that trestle right away the next day.

MR. FREED: I don't think he understands you, your Honor.

Q. You say that after you had made the grade

according to the cross section stakes that the engineer of the defendant said to move such stakes?

A. Lowered the grade.

COURT: Lowered the grade about two feet.

A. In place where first started wasn't that much, and the deepest place about four or five, along in the deepest place.

COURT: And did you then lower the grade so as to make it conform to the new stakes?

A. Yes.

COURT: How long did it take you to do it?

A. Not very long; I put a good force on it.

COURT: How many men did it take to do the work?

A. Had steam shovel; every man I had.

COURT: How many men did you have?

A. Twenty or twenty-five; along in there.

COURT: Twenty or twenty-five men; and how long did it take to do that?

A. They worked all day.

COURT: One day?

A. Yes.

COURT: Did they do it all in one day?

A. Yes.

COURT: So there was one day's work for twenty or twenty-five men?

A. Yes, sir.

COURT: To bring the work down to the new grade?

A. Yes, and tied up the shovel men, the firemen

and the steam shovel engineer and the crane man, you can't work them.

Q. Why was the steam shovel idle?

A. When they changed the grade, was just getting ready to go on it, and when changed the grade, had to tear my trestle down.

COURT: And the steam shovel and crew were idle that day.

Q. Your steam shovel men worked on this change, didn't they?

A. Can't work them on it. Dump men—

Q. How many men remained idle that day?

A. Just on the shovel, the steam shovel.

Q. Three men remained idle?

A. Yes.

MR. DOBSON: And the shovel?

A. Just the engineer, the crane man and the fireman.

Q. You knew, didn't you, and now know the Whitney Company was paying your company \$1500 a month for the use of that outfit, didn't they? They paid you while it was idle, didn't they? They were supposed to pay you?

A. Supposed to pay.

Q. Now, the effect of this change was, it made you do more work. You had to—

A. Do more work, when the order was to cut the grade down.

Q. You had to just do more work, that is all?

A. Sure.

Q. That is all there was to that, wasn't it?

A. Had to do more work, certainly, and delaying you all the time.

Q. I will get to that in a minute, the delay. Will you go on up to the next change, and tell the court about it?

A. From 524 to 527, is that cut?

Q. Were the cross section stakes changed after they were once put in?

A. That cut?

Q. The change you refer to?

A. In that section I just gave you?

Q. Yes.

A. After they were put in the first time, yes, sir.

Q. Had you started to work on that?

A. Had done some hand work on that cut, both ends of it by hand.

Q. They moved it up the hill, moved the stakes up the hill—was that the change? What change did they make? You said they made a change.

A. There was a little change there, not so very much in that cut.

Q. What was it? You told Mr. Dobson what the change was.

A. In this cut?

Q. Yes, in these stations that you referred to there?

A. Stations? There was a change there. The grade was raised a little bit there, not very much. Was raised a little bit, not very much.

Q. What did that mean, Mr. Fobert, that your work was wasted that you had done?

A. Some of it, not very much; was some work done there by hand.

Q. How much, if you can remember that far back?

A. Well, I had a crew of men there for a long while. I don't remember just how much I did; not very much.

Q. Was it a big change or a little change?

A. Wasn't a big change, no not there.

Q. Did it make you do a little amount more work, or a big amount more?

A. Just a little amount at that point.

Q. All right, go to the other changes.

A. Cut 534 to 538.

Q. Cross section stakes were changed at that point?

A. Put in cross section stake there. Line been changed there. Higher cut from what the profile shows; cross section stakes were not changed. The cross section stakes stayed there. There was some in that cut by hand, some of it.

COURT: We are not concerned with that at this time.

Q. Now, what I want to know, Mr. Fobert, I want you to tell the Court which of those changes were made after the cross section stakes were put down, and which were made before? In other words, when the cross section stakes were first put down, was there a change after that?

A. Not at this point.

Q. Go on to the next one.

A. This little cut at 539 to 540 plus was done—that little cut was done by hand.

COURT: I know, but were the cross section stakes changed there? Had the defendant's engineer put in cross section stakes to which you were to work?

A. Yes, sir.

Q. And then changed them afterwards.

A. That was changed afterwards in this change up the hill.

COURT: Put in new cross section stakes?

A. They put in new cross section stakes, on the upper side. It was done; had to go through there and move it—

Q. That makes no difference. We don't care about that. What we want to know is whether or not, before this change was made the engineer had set cross section stakes on the old line, on the original line. I understand you to say they changed the line at that point.

A. It was changed before it was cross sectioned, your Honor. This little cut before it was taken out, it was changed; the cut was too light; it didn't make much—

COURT: It was taken out before the cross section stakes were set?

A. No, was cross sectioned, I say, and after that cut—little bit of cut here, five foot cut it shows here; that would be maybe two on both sides, maybe three, maybe flat there, maybe four on the upper side. Very flat place there. Well, we had to go through that—

went through that cut with steam shovels. Just ahead of the cut with steam shovel. This bank here was too dangerous for me to go on the edge of it, just two or three dippers of the shovel, went along and picked her up and swung her over to get by, and went in to the next cut from Station 542 to 556, along there.

Q. Were the cross section stakes changed after they had been put in at these points?

A. No, sir.

Q. No cross section stakes in when the change was made?

A. No cross sections; not to hurt me.

COURT: You did the work according to the cross section stakes which remained?

A. Yes, sir.

Q. When you went to move the shovel above, you had to do some extra work in order to get your shovel through?

A. About two or three minutes work with steam shovel, where would take a bunch of men a long time.

COURT: That was not because that change there made in the grade?

A. No, sir, from that point I went along with the shovel and cast the rest into the fill or place; where was no cut made for fill I just borrowed.

Q. Was any change made the rest of the way?

COURT: Any change made in the cross sections after cross sectioned beyond?

A. No.

Q. Now, Mr. Fobert, before the cross section stakes were put down, was the road located? You know what located means in engineering parlance?

A. Yes, sir.

Q. Was the roadbed located before the cross section stakes were put down?

A. Had to be; they couldn't put the cross section stakes down without it.

Q. Let me ask you this. When did you get your ideas about where the fills would be, and the cuts would be? Did you get it from this profile?

A. I will say this profile was no good for the work we done.

Q. This profile would not show?

A. Not on that work up there; no good for that work.

Q. Why?

A. Just give you this for the station.

Q. Why?

A. It was changed, the line was changed.

Q. I am asking you, after looking at that profile you have right there, looking at that paper at say Station 510—could you tell where that line was going to be?

COURT: Could you take that profile and go out along the line, and trace the line from the profile?

A. This profile?

COURT: Yes.

A. Yes, sir.

Q. Could you tell how far up the hill, by looking at that profile the line was to be?

A. How far they threw it?

Q. Let me take this one case. Take Station 510, I don't know anything about what is there, but take at Station 510. Suppose you would have gone to Station 510 before the cross section stakes were put in—you understand what I mean?

A. Before—

Q. Before the cross section stakes were put in at Station 510, suppose you had gone and stood there, could you have told where the line was to have run?

A. Yes.

Q. How could you have told? As I understand that profile is only projected at that point.

A. Yes, sir, it is.

Q. What's the good of any locating? What's the difference between projection and location then? You understand the words?

A. Yes, sir.

Q. What's the difference between a profile at these points and way back the first two or three miles, or the first four or five miles?

A. Well, they followed the first work, and after there they didn't. The profile is no good.

Q. I am asking you is there any difference in the profile? Don't you call this altered grade all along here, about which you told the judge, only projected?

A. I told you all along the profile the same thing. The little cuts or the big cuts.

Q. You don't understand me, Mr. Fobert. This

is only a projected line on the profile, isn't it? That is not a located line, is it?

A. Supposed to be.

Q. Is that located location there at Sam Down's Creek. Turn to Sam Down's Creek on that.

A. I am going down to where the work is done exactly by that profile?

Q. No, turn to Sam Down's Creek, and I will explain what I mean. I don't want to confuse you. Now, this profile is the same on this side of Sam Down's Creek as it is on that? Same kind of a profile?

A. Well, this profile, they don't show the profile—they don't show on the profile when they changed their grade.

Q. I am not talking about whether they made a change or not. You know what a projection is, don't you?

A. When we project, this isn't the real profile on the work.

Q. Let me ask you this. Could you take that profile at Station, say, 510, knowing in a general way where the road was to run, and the station there, and say to me, "Freed, that roadbed is to be five feet from the top of that hill"? Here is the hill.

A. No, no. Yes, I get you now, yes.

Q. Could you?

A. I could a portion of the road—

Q. No, I am asking you, could you do it?

A. Yes, sir.

Q. Tell us how.

A. I won't say I get every point.

Q. Just give the Court an illustration.

MR. DOBSON: He asked about 510; just go to 510.

MR. FREED: I am not bound by 510.

MR. DOBSON: Just the one mentioned.

A. Now, here is—this profile shows a cut here, your Honor. About fourteen feet of a cut. The work we done showed no cut. The grade hits the top of that and these cuts are there, bigger than what they show.

COURT: That doesn't answer counsel's question.

Q. I mean, Mr. Fobert—just to relieve your mind—I am not trying to say that the work as done follows this profile. We are not asking that.

A. No, can't follow the profile. That is your profile when the engineer puts that stake down and marks on it.

Q. I am asking you, could you go out there and, taking this profile in your hand, without taking a surveying outfit, or something of that kind, could you say this shows that the line ought to run right about along a line five feet from the top of that hill?

A. You could, yes, sir.

Q. How could you tell that? That is remarkable to me.

A. Because I could tell you; not all over it.

Q. What shows it on the map to you? Take any place. Tell the court what shows it to you. I don't believe he understands my question.

A. No, I don't.

COURT: I suppose this is alongside the hill. This is located alongside a hill or mountain?

A. Yes, sir.

COURT: Now, down here we will say is the foot of the mountain, the river, or whatever it is. Up here is the top of the mountain. Now, can you tell by looking at this, this paper, just how far up the mountain and at what point on the side of the mountain this road is located?

A. Pretty close to it; not all along; not all over. I can take up a good many points, yes. I was on that work every day.

COURT: We are not talking about the work. Suppose you were not on the work, but wanted to bid on the work, and you took this profile and went up there and looked at it.

A. I understand that grade from A to Z, your Honor.

COURT: Before you know where the road is to be located, you have to wait until the engineer sets the grade stakes.

A. I understand this profile better than try to explain it.

Q. We are not saying you don't know all about it, but that is not my question. I want you to tell from this. It is my understanding that a profile map shows you what you have to take out at a point, and what you have to put in at a point, but does not show you, just looking at the profile, whether or not it is half-way up the side of the mountain, running

along, or down within ten feet of the bottom of the mountain. Now, I want to see what you say about the matter.

A. It don't show—the location don't show—

Q. This profile doesn't show the location, is what I mean to say, does it?

A. It should.

Q. What part of it?

A. Doesn't it show this cut here? Don't it show the fill?

COURT: You don't know whether this cut is a hundred feet up the mountain, or two hundred feet or five hundred feet.

A. I see what you are getting at by location. I got to know where.

COURT: If you see some contour at the side of the mountain that you think would just about require that depth of cut and that depth of fill, you say—

A. I hit you pretty close. Been over, and been at that kind of work all my life, you see.

MR. GEARIN: Not from the paper.

A. You have to have the paper to get the station number.

Q. What I mean is, you have to be on the ground with this?

A. Yes, sir.

Q. Did you go over this part of the road before the contract was let?

A. Not all of it; didn't go over it all; didn't go over that at all.

Q. That first visit that you and Mr. Glavin, I

think, and Mr. Cole went out, did you go over this part of the roadbed we have been talking about these changes in? Did you go over that part? Did you and Mr. Glavin and Mr. Cole visit that part of the roadbed?

A. That placed part of it?

Q. No, the part of the roadbed in which these changes were made that you spoke of?

A. No, I didn't know anything about those changes.

Q. You said there that you went out there on that work a few days after the contract was let for the purpose of laying out the work; went out with Mr. Glavin?

A. And Mr. Crook and myself.

COURT: And Mr. Cole.

A. And Mr. Cole.

COURT: And you went up the line a certain distance?

A. Just to get a start. Didn't go very far.

COURT: How far up the line did you go? About how many miles?

A. I started from where we covered ground in the first grade.

COURT: What?

A. You just want to know how far I was up the line?

COURT: Yes, what was the furthestest station you got to?

A. Sam Down's.

COURT: Did you cross that river you spoke of?

A. Kilches, yes; crossed over a foot bridge.

COURT: How far up did you go above that?

A. Went up to Sam Down's Creek.

Q. What station?

A. 380, along there, 390; that is it, 390.

COURT: That is as far up as you went?

A. Yes.

Q. Now, when you first went down there on the job, you understood, didn't you, that the Whitney Company's chief engineer had the right to make certain changes in the alignment of his roadbed, didn't you?

A. Yes, sir; or any right.

Q. I am not speaking of your idea, that an engineer has absolute authority.

A. He has.

Q. I understand that, but did you know when you went up on this contract—had you ever had it read to you?

A. Not very much; I didn't pay much attention to the contract.

Q. Did you know that in this contract it was stated that the chief engineer of the Whitney Company could make changes? Did you know that?

A. Could make changes?

Q. Could change the alignment.

A. Why, yes, they can do that anyhow.

Q. Didn't you know that this territory through which these changes were made that you speak of—you knew that the roadbed was running on the side of the hill, didn't you?

A. Yes, sir.

Q. You knew, therefore, that a slight change throwing the line up the hill a few feet, or down the hill a few feet, would make quite a bit of change as to cuts and fills, didn't you?

A. No.

Q. I mean you would know that as an engineer, or superintendent, whatever you were.

A. Different way you can throw that line, make it heavy or light.

Q. I understand, but I say a slight change in the alignment throwing it up or down, if on the side of a hill, a slight change would make more difference than it would if it were on the level ground, wouldn't it?

A. Yes, sir.

Q. You understand what I mean?

A. I understand that part.

Q. That is, if the roadbed is running along level ground, and you have merely got to throw up dirt, you know, to make a bank or to take out a little hill, if you throw over to the right or left a little piece, that doesn't make very much difference, but if you are on the side of a hill, where there are ravines, cuts and fills along there, throwing out the line a few feet, can make quite a difference.

A. Increase, certainly. Double; heavy; you can throw that line either way, can make it cast work or thorough cut work.

Q. You understood that all the time?

A. I knew that could be done.

Q. You understood that with reference to this job?

A. I seen it there; I seen it down there.

Q. Mr. Fobert, you knew that up along the sixth, seventh and eighth mile, and beyond along the ninth mile, somewhere in that territory or all that territory you were running,—your road was to run on the hillside, didn't you?

A. Was to run on the hillside first location?

Q. Yes.

A. Yes, sir.

Q. Would be in there some place, first, last or any location?

A. Should make as light work as possible.

Q. Therefore you would know, or should know, that if they threw the line up the hill four or five or six feet—you understand?

A. Yes.

Q. Further than was originally intended?

A. Yes.

Q. I said—that would make quite a bit of change in the material to be moved and work to be done?

A. Yes.

Q. And if you threw it down the hill, that would change it the same way?—whether thrown up or down; it would make a change, one of them would make less and one make more, probably?

A. I rather have it go down. Better work and lighter, get through quicker.

Q. But you realize that a slight change in the

line of the road, the alignment, would make quite a bit of change in the amount of material to be moved, didn't you?

A. Awful difference; whole lot of heavy work.

Q. Now, as a matter of fact, do you know how much additional work was done throughout this territory in which all these changes have been made you have been telling the court about?

MR. FREED: Has he figures?

MR. DOBSON: No, he doesn't know.

A. I didn't keep track of it; it wasn't my part of the work. I was up there to do that work as quick as possible. I didn't keep track.

Q. You have told the Court from time to time when Mr. Dobson was questioning you that made so much more work. Isn't there any way, and haven't you any records that you can refer to, and just tell us how much was added to the cost on account of those changes?

A. I haven't got it.

Q. Have you any idea?

A. I have no idea. I am farming; been farming two years, and I quit the business. You expect me to carry—

MR. FREED: But Mr. Dobson, he has told the Court about this increase.

MR. DOBSON: He just gave approximate.

A. That isn't my part. Even when we go, that isn't my part.

MR. DOBSON: He was just to give the Court some idea about the time consumed.

MR. FREED: Is there any record he can refer to and give the Court the amount of money that was added to it?

MR. DOBSON: We will have a report on each mile.

Whereupon proceedings herein were adjourned until tomorrow morning at 10 o'clock.

Portland, Ore., Friday, Oct. 26, 1923, 10 A. M.
ALEC FOBERT resumes the stand.

CROSS EXAMINATION
(Continued)

Questions by MR. FREED:

Q. Mr. Fobert, you said that at Station 434—you have turned to that have you?

A. Yes, sir.

Q. Now, at that point you said that there was a change made after the cross section stakes had been put in didn't you?

A. Just that one point?

Q. That is about 434, isn't it, right there?

A. That is where the change starts from.

Q. Referring to the cuts and fills shows between 435 and 440 didn't you say that the change was made or a change was made after the cross section stakes had been put in the ground?

A. From that point to point 445 or 446 along there, yes, sir.

Q. Are you sure that this change particularly as affecting these cuts and fills between 430 and 440 was made after the cross section stakes were put in?

A. What do you mean by affecting?

COURT: The change made after the cross section stakes were put in; as to those you referred to along the line, the changes?

A. Yes, sir.

Q. Now, in talking about stations that touched between Stations 430 and 440—had anything to do with them—any changes between 430 and 440?

A. Affect the station?

Q. Look at this profile. Were any changes made between 430 and 440?

A. Yes, sir.

Q. After the cross section stakes were put in, were the cross section stakes taken up and moved between those two stations?

A. Picked up and moved.

COURT: Had the surveyor or engineer put in cross section stakes for his work before the change?

A. The change was made.

COURT: We understand where the change was made now. What we want to know is whether the cross section stakes had been put in by the engineer before the change?

A. Yes, sir.

Q. Now, you are sure of that, are you?

A. Yes, sir.

Q. Now, Mr. Fobert, how do you remember those changes, that you have told the Court about yesterday and this one this morning?

A. This cut over here, your Honor—

Q. No, all of them. How do you remember the

changes? What makes you remember them? Looking at this map, this profile, does that recall them to you?

A. No, I could tell you without looking at that profile at all; get the number and the distance; I have to have the profile to keep it all in my head.

Q. I don't believe you mean to answer no to that. You have told the Court, for instance, that there was a change between 430 and 440?

A. Yes, sir.

Q. Now, I want to know, how do you remember there was a change at that point?

A. There was some work already done, but hadn't been completed.

Q. How do you remember that?

A. By me being on the work and doing the work.

Q. That is,—this was done in 1920?

A. Yes, sir.

Q. In the early part of 1920?

A. Yes, sir.

Q. And you still remember that far back?

A. Yes, sir.

Q. And you remember well all those fills you have told the Court about?

A. Yes, sir.

Q. Since this time that you did this work for the Whitney Company?

A. Yes, sir.

Q. You have done a great deal of other work, haven't you? You have been on other jobs?

A. No, sir.

Q. That was the last?

A. That was the last.

Q. The last job you were on?

A. Just a minute; I want to be sure about this. After I was there with the company, you mean have I done any other work?

A. Yes.

A. No, that was my last work.

Q. Did you ever see a map showing the roadbed as it is today?

A. No, sir.

Q. And never saw a map showing the roadbed as it was built?

A. No, sir.

Q. That is the same as today?

A. No, sir.

Q. Well, then do you want to tell the Court that between Stations 430 and 440, while the profile shows certain cuts, you understand, and certain fills.

A. Yes, sir.

Q. In fact, in doing the work you made certain cuts and certain fills?

A. Yes, sir.

Q. This is purely from your memory. You just remember what you did?

A. Yes, sir; that is what I said.

Q. Why were those changes made that you spoke of?

A. That is up to the engineer.

Q. Do you know why he made them?

A. He didn't tell me why he made them.

Q. He didn't speak to you about the reason for any change that he made?

A. No, sir, not that I remember.

Q. He just told you to change them?

A. He didn't have to tell me.

Q. By making the changes that you have spoken of, didn't they at any time make the work less?

A. Always made more work.

Q. They never made a change that made less work for you?

A. Have made some; little bit.

Q. But very little of it were changes that lessened the work? Most of the changes made more work?

A. Made more work.

Q. That is what you mean to say?

A. Yes.

Q. What did those changes do to the line? Did they straighten out the line?

A. Made a better line.

Q. Better for what?

A. Made better railroad.

Q. If the line had been put in just where you say you thought it was going to be put in, and not thrown up the hill, in some of those places, could you have made the fills stick there?

A. Places? Yes, most places.

Q. Were there any places where the railroad was thrown up the hill that, if it hadn't been thrown up the hill and left where you thought it was going to

be, you couldn't have made the fill—do you understand what I mean?

A. Yes, sir.

Q. Were there any such places?

A. Through such places.

Q. How many such places were there?

A. Oh, I couldn't tell you all of them.

Q. There were places of that kind?

A. Yes.

Q. And it was necessary therefore in those cases for the roadbed to be pushed up the hill a little, wasn't it?

A. Yes, sir.

Q. You understand that?

A. I understood; understand they did, yes, sir.

Q. I mean you understood why it had to be pushed up the hill at those places?

A. Yes, sir.

Q. How many such places can you remember?

A. I can remember some of them.

Q. Isn't it a fact that in a good many of those cases those changes that you speak of, of the roadbed being pushed up the hill a few feet from what you expected, that the purpose of that was to make a roadbed that would stick; that is, where the fill which you threw in would stick?

A. Yes sir.

Q. You told the court yesterday that some of the additional work that you had to do was caused by the Whitney Company's engineer directing you to fill up a fill, or to make a fill, I should say, put dirt

in there instead of putting a bridge across—that is right, isn't it?

A. Yes sir.

Q. Isn't it a fact that if the Whitney Company had gone ahead and had bridges put in there by whoever was doing that work, instead of having you fill in there, that you would have been delayed? Is that too long a question? Do you understand? Let me ask you before you answer: Didn't that lessen the work? Didn't that get you ahead quicker by the Whitney Company telling you to fill up this gap here instead of waiting until they had the bridge built?

A. The fill that—they had to build a trestle to fill it.

Q. But would you have been able to go ahead beyond that place more quickly if the Whitney Company had said to allow them to build a bridge there?

A. Yes sir.

Q. Wouldn't you have been delayed by the building of a bridge there?

A. I would have built it ahead before the shovel got there.

Q. What?

A. The bridge would have to be built ahead before the shovel got there so wouldn't have to be delayed.

Q. That is the way you would like to have it done?

A. That is the way it has to be done; no other way to do it.

Q. Was it done?

A. Was done when the shovel got there to fill, because the track is there already, and the fill is already.

Q. You don't understand what I mean. I understand you, or one of the witnesses that was on the stand before you were, to say that you had been delayed in places because the bridges which were to be put in had not been completed?

A. Yes sir.

Q. That is a fact?

A. At two places.

Q. You heard Mr. Glavin, or some one—

MR. DOBSON: You don't mind a distinction between bridges and trestles.

I am talking about bridges; that is a fact, isn't it?

A. Bridges. Not at this point you are talking about; bridges down at Down's and Clear Creek across the river; those are bridges. The rest of them, they don't call them bridges.

Q. Who built the trestles? Not the temporary but the permanent trestles when put in, who built them?

A. Shea-Parker.

Q. That was not part of your grading contract?

A. Wasn't grading contract, no, sir.

Q. Sir?

A. No, not that I know.

Q. Were you ever delayed by Shea-Parker in getting the trestles in in time?

A. Yes sir.

Q. Shea & Parker tried to do the best they could, didn't they?

A. You bet, yes sir.

Q. It was because of the conditions that existed. You know what I mean by conditions?

A. Yes sir.

Q. That they were not able to get these trestles in always ahead of you, wasn't it?

A. Yes sir.

Q. You told the court yesterday that in some places, where you expected that a trestle would be built, a change was made and you had to make a fill there. That is a fact, isn't it? I mean, that is what you said?

A. Where a trestle was to be built?

Q. Were some places where the profiles showed a trestle, when you got there the Whitney Company's engineer said he wanted you to make a fill there—he didn't want a trestle?

A. Yes sir.

Q. That is so?

A. Yes, sir.

Q. Now, I am asking you whether or not because they made you fill that place you were delayed any?

A. Well, we were bound to be delayed.

Q. Wouldn't you have been delayed by Shea & Parker not getting their trestles finished? You don't understand.

A. Shea & Parker didn't put in this trestle work. I put them in myself. You are jumping in a different place altogether.

Q. No, you told the Court that you thought a permanent trestle was to be put in at a certain place, didn't you, and when you got there you were ordered to fill that gap instead of the Whitney Company putting in a trestle?

A. Show me the place.

Q. You will have to show me.

A. You started one bridge, then you drop that and go to another place where they cut out a trestle and put in a fill. If you talk about Clear Creek bridge or Sam Down's Creek stay with it, and I can answer it.

Q. Let me tell you this: I don't want to confuse you. In some places, or in some place, you told the Court at some point that that roadbed or profile showed that a permanent trestle was to be put in, but when you got there you were told by the Whitney Company's engineer to make a fill at that point; is that a fact?

A. Just explain that again.

COURT: You testified yesterday that at certain places on the line a trestle was cut out and a fill substituted?

A. Yes sir.

COURT: That is what he is asking you.

Q. Turn to some point on there where that was done.

A. Here is what it shows.

Q. This is the cut left at 450, isn't it?

A. Yes, that is right.

Q. Now, you say that you thought at that point, about 448 there was to be a trestle?

A. Trestle. Marked there trestle, you see.

Q. But you were ordered by the Whitney Company's chief engineer to fill that place.

A. Yes, sir.

Q. Now, you understand that?

A. I understand it.

Q. Suppose the roadbed had been built just according to what you say this profile showed. Who would have built that trestle there?

A. Across these fills here?

Q. Yes.

A. If it was built according to this profile?

Q. Yes.

A. Shea & Parker.

Q. That wouldn't have been part of your work? That is what I mean.

A. It wouldn't have been part of my work.

Q. Shea & Parker built other trestles on this work, didn't they?

A. They built across the river and at Clear Creek and Sam Down's.

Q. They built only bridges, no trestles?

A. They built a temporary trestle at the end of it to connect—they run their temporary trestles—they cut out some of this trestle. They made a fill so that didn't make the trestle as this profile called for. I drove some temporary, just rough, picked up anything rough for me to get across with the shovel and

borrow the material and fill instead of having such a long trestle.

MR. FREED: I won't go any farther, your Honor. He doesn't understand this.

Q. Now, I am asking you, were you ever delayed by not having one of these trestles built, the bridge built ahead of you?

A. Was delayed at both of these bridges.

Q. Were delayed?

A. Was delayed at both of these bridges.

COURT: What bridge do you mean?

A. Clear Creek and Sam Down's.

Q. Then do you think that you would have been delayed at this point, 448 you spoke of; do you think you would have been delayed at that point if the road-bed had been completed just like this profile shows?

A. I would have went ahead and got that fixed and got across with the shovel; would have got up the hill.

Q. If they had required Shea & Parker to put in a trestle do you think you would have been delayed at that point?

A. If the trestle had been—would have been no trestle—what do you mean? When I got to that point you mean if the trestle wasn't there? Is that it?

Q. Yes.

A. I would have went ahead and had it fixed so could have got across before the shovel got there; would have had it laid.

Q. You would have got it fixed so as to get across; put in temporary trestle?

A. About seventy-five feet up the hill from that bridge; wouldn't have been over eight to ten foot fill; I would have dug around with the shovel, or would have made what they call a shoo-fly, you go around to save building such a big trestle; would have went up the hill farther, so I would have had to put in a couple of bents—some bents; temporary. Some plank I had to put in. I had to put in my own trestle in all those fills to dump material.

Q. Then you would have had to put in temporary trestle just the same as you did to make the fill?

A. Just the same—stronger.

Q. You would have had to put in a stronger trestle?

A. Required a little stronger for the shovel; I can show you the point where we did that.

Q. I won't ask you about that. Now, when was this work done? What time of the year was this work along the line where these changes were made? Will you tell the Court about what time?

A. I couldn't answer. I didn't keep track of it.

Q. Well, do you know whether the work was done——

A. I couldn't tell you the time.

COURT: Was it in the summer or winter?

A. Summer.

Q. You therefore did it under very favorable weather conditions, didn't you?

A. Yes, sir.

Q. Now, Mr. Fobert, if this roadbed had been

built just exactly like you expected it would be built——

A. Certainly it would.

Q. Just a second; I haven't asked the question yet. If this roadbed had been built—if Mr. Norris had told you to build it just exactly like you thought it was going to be built, would it have been finished by January 1, 1920?

A. Not by Mr. Norris, because he got on the work——

Q. Norris or Cole or anybody. Suppose you had built the road exactly like you thought it was going to be built, would you have finished it by January 1, 1920?

A. Yes, sir.

Q. What is a good day's work for a steam shovel in excavating?

A. It depends on the size cut and the material handled.

Q. Taking a good day for a steam shovel under good conditions?

A. The capacity of the shovel we had was 3500 yards a day.

Q. You didn't do 3500 yards a day, did you?

A. No, sir.

Q. What is an average day for the materials along the roadbed, as you thought it was going to be built?

A. What do you mean? Load in small cars or cast?

Q. I am talking about the most favorable condi-

tions; I don't care which they are. What do you think your steam shovel could have averaged a day along the roadbed if it had been built just as you thought it was going to be built? How many yards could it have averaged a day?

A. Loading cars or casting? There is a difference, you know.

Q. Just like you thought it was going to be built; if you thought it was going to be casting, let's take casting; if you thought it was going to be loaded in cars, let's take loading.

A. Some days casting with shovel will move a thousand yards; some other days will move three thousand yards; all depends on how big the cast was.

Q. Let me put it this way: You were down there on the job with Mr. Cole and Mr. Glavin?

A. Yes, sir.

Q. That is early in say July and August, 1919; when you made that first trip down there I mean.

A. Before the outfit was down there; went down there to meet Mr. Cole and tell Mr. Cole and Mr. Glavin when to start work.

Q. Did you at that time make any figures, or did you try to estimate? Do you know what estimate means—calculate?

A. Calculate on the work; that is what I was there for.

Q. Did you try to calculate?

MR. DOBSON: He doesn't understand that word.

MR. FREED: He said he did.

MR. DOBSON: His answer showed he didn't understand it.

A. I went down there for——

Q. I know what you went down there for. Do you understand what the word estimate means?

A. I didn't handle that grade——

Q. No, no, do you understand what the word estimate means?

A. Estimate, yes.

Q. Did you on that trip you have told about estimate how many yards you expected your shovel to move each day?

A. No, sir.

Q. You didn't think about that at all, did you?

A. Didn't go down there for that purpose at all.

Q. How do you know then that you could have finished that work by January 1, 1920? I just want to get your reason; I am not trying to confuse you.

A. Knew the yardage the profile showed.

Q. Suppose the profile shows—what does it show?

A. I don't remember just now.

Q. Suppose it says 150,000 yards of excavation—I believe that is about what it shows.

A. Some were along there.

Q. Suppose it shows 150,00 yards——

MR. DOBSON: As a matter of fact it doesn't; the whole yardage on the whole line would be 150,000; not the steam shovel.

Q. I don't care about the 150,000 yards. I will stand on that. If it had shown, if the profile showed

150,000 yards of excavation to be done on this twelve-and-a-half mile railroad. You started in your excavation about August 1st, didn't you?

A. Somewhere along there.

Q. Did you expect to move 150,000 yards of dirt by January 1st?

A. Yes, sir.

Q. Well, now that is four months.

A. Yes, sir.

Q. You expected to do that with that steam shovel and that crew?

A. Yes, sir.

A. That would average over six thousand yards a day?

A. Yes.

Q. Do you think you could average over a thousand yards a day?

A. What do you mean, every day?

Q. With your shovel and with your crew you had down there?

A. I could have put in enough crew to do it.

Q. With the crew you had on the job? Of course you could have put enough men in there to dig the Panama Canal in that time, but with the men you had in there and with that shovel?

A. What time now? I wasn't there the first part of the work.

COURT: In four months.

A. Could put in with a crew.

Q. Then you would say that if you did only nine miles of work by October, 1920, which is a fact——

A. Yes.

Q. That is nine months after January 1st?

A. Yes.

Q. That you were delayed nine months?

A. Yes.

Q. Where was all that delay?

A. First beginning the work.

Q. How much did that delay you?

A. Along three months.

Q. Sir.

A. Around three months, that first part; short distance there.

Q. But as I understand, you expected to use another method of excavating there—other than the steam shovel?

A. Yes.

Q. You expected to have men and horses?

A. Yes.

Q. All that first month delayed you at the beginning was with your steam shovel, wasn't it?

A. Yes, take a shovel and do that work instead of the way we had it planned first time.

Q. How long was the steam shovel delayed? How long did you keep the steam shovel down there at 17?

A. I couldn't tell you exactly; it was kept there all summer or fall.

Q. It didn't start until August 1st.

A. August 1st.

Q. Then you are prepared to tell the Court that that went on at the start—that you kept the steam shovel down there?

A. I didnt' keep it down there; don't get that in your head. I wasn't on the work at the time.

Q. How do you know then that this delayed you that much?

A. The records show.

Q. You are going then by what somebody told you; what Mr. Glavin told you?

A. No, I don't have to go by that.

Q. Maybe you don't understand me. You say that you had only nine miles of roadbed built by October 1, 1920?

A. Yes.

Q. So that you were delayed, that is that is the principal reason. I understand you have other reasons. So that you were delayed at the beginning of the work?

A. Yes, sir.

Q. Did Mr. Cole or Mr. Norris, whoever it was had you do the steam shovel work at the beginning of the line as you didn't expect to do it——

A. Not Mr. Norris, Mr. Cole.

Q. All right, Mr. Cole had you do it. Now, I ask you how you could figure——

A. Just a minute; you said for me. I went down there to start the work; get the work lined up to start. Told Mr. Cole, "Here is Mr. Glavin coming up to superintendent the work." It was up to Mr. Cole

and Mr. Glavin. I can't tell you all the details about the work.

Q. It is shown and you told the judge——

A. Not on that piece of work; I am telling the truth. I am up here to tell the truth.

Q. Now, Mr. Fobert, how did you estimate that this piece of work could be finished by January 1, 1920?

A. I have done the same work in that short time—whole lot bigger work than what that work was.

Q. Did you estimate that? Did you and Mr. Glavin or you and Mr. Fobert get together and estimate by looking at the profile, or looking at the ground, that you could finish it by January 1, 1920?

A. Yes, sir.

Q. Who did that with you? You and who?

A. My partner, Mr. Rajotte; Mr. Glavin.

Q. When did you do that?

A. Before we started to work.

Q. Before the contract was signed?

A. Around there.

Q. What figures did you have before you? Did you have that profile before you?

A. Rajotte had.

Q. No, I am asking you; did you see that profile then?

A. I saw the profile the day I went down there.

Q. No, I am talking about before you went down there.

A. I saw the profile in the Portland Hotel here.

Q. Did you go over it and unroll it and examine the whole profile?

A. Yes, sir.

Q. Did you have the figures added up before you; somebody have the figures to show you what they added up?

A. I seen the figures but I don't remember them now.

Q. I mean were they called to your attention at that time?

A. Yes, sir.

Q. Had anybody who was in that conference with you at the Portland Hotel been over the ground?

A. No.

Q. They had not?

A. No.

Q. Then any estimate that you made at that time was made from this profile?

A. At that time, yes, sir.

Q. And that was the only time that you made an estimate before the contract was signed?

A. That was the first time; not the only time, but the first time.

Q. Did you do it again before the contract was signed?

A. No, that is just about the time the contract was signed.

Q. And you knew, as you told the Court yesterday, that a slight change in the alignment of this

roadbed where it ran along the side of a hill might make a great deal of change in the amount of material to be moved?

A. Change in it? The engineer has got that privilege to change the work at any time.

Q. But you knew in looking at that profile when you were at the Portland Hotel, that a slight change in the alignment—you know what alignment means?

A. Yes, sir.

Q. In the part of the roadbed where it ran along a hillside——

A. Yes, sir.

Q. Might make a great deal of change in how much work you had to do? Didn't you know that?

A. You can make a change to lessen the work or can make a change to make more work; you could do either one.

Q. You knew that at that time?

A. Anybody knew that.

Q. In these conferences you spoke of at the Portland Hotel—you know what I mean by conferences—you and Mr. Rajotte and Mr. Glavin.

A. Mr. Rajotte was not there at that time; Mr. Rajotte was here.

Q. Who was there?

A. Mr. Winters, Mr. Crook and Mr. Glavin.

Q. Mr. Winters is a member of this firm?

A. Yes.

Q. And Mr. Glavin is the superintendent?

A. Yes.

Q. And Mr. Crook is one of your workmen?

A. One of our superintendents.

Q. Was it ever talked about at that meeting that you spoke of that there could be changes made?

A. They didn't talk about making changes; looked at the profile and figured the yardage there on the profile.

Q. You therefore made the estimate at that time based on the profile without any changes?

A. Yes, sir.

Q. And you understood, you say, that slight changes in the alignment might make a great deal of difference or change in the yardage?

A. Yes, sir.

Q. If this work had been finished by January 1st, wouldn't you have had three months of work in wet weather? Didn't it start raining October 1st.

A. Yes.

Q. You would have had October, November and December in the rainy season?

A. Yes, sir.

Q. You figured on doing the work during the rainy season, didn't you?

A. Figured? Yes, sir.

Q. You knew you would have to do the work in the rainy season?

A. Yes, sir.

Q. Can't you make better progress in the dry summer than you can in the wet fall and winter? You can get along faster in the dry summer than you can in the wet winter, can't you.

A. The upper end of that work along the side

where cast the material was better, and some rock in the material, in the dirt, and it was all cast, figured was all cast and the rain wouldn't bother that work.

Q. How did you figure that? You hadn't been over that ground when you had the conference at the Portland Hotel; you hadn't been over the ground?

A. My partner had been over the ground.

Q. And he told you at that time that the upper part of the work could be done easily in the winter?

A. He told me the upper part of the work was very steep sides; understood it was very steep.

Q. He understood it was very steep?

A. Very steep sides.

Q. Did he say he had seen it?

A. I don't remember whether he said that or not, now; I couldn't tell you.

Q. Now, Mr. Fobert, I understand you to say that if the Whitney Company had stuck to this profile, if its engineer had had you follow that profile, your work would have been hastened, quickened?

A. If they would increase the yardage——

Q. No; if they followed that profile, had it built exactly like that profile, you would have gotten done much more quickly.

MR. DOBSON: I don't think he said that.

MR. FREED: He didn't say it in words, but he said the delay was caused by their leaving this profile.

A. No, sir, I didn't say that.

Q. You think if they had stuck to this profile they wouldn't have gotten along any faster?

A. Sure would have gotten along faster; not so much yardage in that. If the steam shovel makes a thousand yards a day and only had ten thousand yards to move, and you change that to twenty thousand, and she moves the same capacity every day, you cut it in two, wouldn't you?

Q. Until the grade stakes are put in, Mr. Fobert, the contractor doesn't know what he has to do on that job, does he?

A. Build before the cross section?

Q. Before the cross section stakes are put in, I just want you to tell the Court, has the contractor a right to believe—before the cross section stakes are put in the ground—you don't know what the grades are going to be, do you?

A. In places you know, in other places you don't.

Q. How do you know in places?

A. I have reference to light work, which shows exactly what it is, over the ground in particular.

Q. Sir?

A. On light work, where they locate on light work; they usually locate light work pretty close; big work they can't locate so close. You can build that just on the profile, just exactly the way the profile shows.

Q. Then I understand you to say that neither you nor anybody else can tell just what the work is going to be there, until the engineers—and the engineers can't tell until he goes down and locates these stakes?

A. He can't tell right to the yardage, he can tell pretty closely.

Q. That is on light work. On these big cuts and fills, what about that

A. He can tell on big cuts; all depends the conditions the cut is, sinking your cut.

Q. Were you able to tell before the cross section stakes were put in what you would have to do?

A. Know what we had to do in the cemetery cut, first big cut.

Q. I am talking about all that.

A. That first part of the work, could tell every bit of it.

Q. What good are cross section stakes? Why do they put them in?

A. You have a bunch of men, you can't be with them all the time, every man. You put in cross section and you put in a stake on each side and in the middle; that line is run here. They mark it fill or cut, whatever it is, and they will put a stake on the side where the slope runs, and where the slope down runs out, so you won't put any more material than it calls for.

Q. You understood, when you were on the job down there, didn't you, that you were to wait and see where Mr. Norris put in his cross section stakes?

A. Well, Cole was working down there, not Norris.

A. All right, Mr. Cole, then. I am not on anybody's work; I am on the whole line.

COURT: You couldn't build this road without cross section stakes, could you?

A. No, sir.

REDIRECT EXAMINATION.

Questions by Mr. Dobson: Mr. Fobert, I want to ask you this: Could you go down on this work that Mr. Freed has been talking to you about and make an estimate of what it would cost to construct that roadbed or build the roadbed before the stakes had been put in the ground?

A. I can make a rough estimate of it?

Q. And how long have you been in this business, did you say?

A. Ever since 1897.

Q. Now, is it customary to have stakes in the ground when you go out and look at a piece of work and make your bids? Are they always in the ground when you make your bid?

A. When we make it?

Q. When you make the bid; when you consider whether or not you are going to do the work?

A. Yes.

Q. You mean to say you go out on the work always and always find stakes when you go out and look at the work?

A. Yes, sir.

Q. Before you bid on it. Do you understand my question?

A. Yes, sir; the location stakes.

Q. Just the location stakes?

A. Location stakes.

Q. What is the difference between location stakes and cross section stakes?

A. Location stakes is to locate the work.

Q. Listen—let's get it plain. Isn't the location stake merely to indicate the center line of the railroad?

A. Proposed center line of the railroad.

Q. Let me ask this to get it straight: Would you find what we call cross section stakes or slope stakes at the time you went out merely to bid on the work?

A. No, sir; no slope stakes.

Q. When are these cross section stakes usually put in the ground?

A. Cross section stakes put in the ground after the right of way is cleared.

Q. That is after the actual work of building the railroad commences, is it not?

A. Yes, sir.

Q. Now, Mr. Fobert, it is not necessary, as I understand it, to have cross section stakes in the ground to make your bid; is that true? In other words, you don't have to have these cross section stakes in the ground out there to make the bid. Do you know what I mean by making a bid?

COURT: When you make the contract for building the railroad.

Q. You decide how much you are going to ask the owners here, the Whitney Company, to build that road; you don't have to have stakes in the ground to tell you that, do you?

A. No, I don't have to have.

Q. That is when you make bid or estimate what you are going to do it for?

A. No, you don't have; it can't be done. That is not a thing that can be done.

Q. Now, Mr. Fobert, is it or is it not a fact that when you make a bid, you don't rely entirely upon the profile, do you?

A. No.

Q. Isn't it a fact that you rely upon what is told you by the engineer as to how he is going to have that work done?

A. Sure.

Q. Don't you rely upon that just as much as you do upon your profile?

A. Yes.

Q. That is a fact, isn't it?

A. That is a fact.

Q. Now suppose when you went out to do this work the engineer had told you that when he set his cross section stakes and his slope stakes, they would be set in such a way you could cast the material instead of hauling it, what would that meant to you?

A. Meant time and cheaper doing work.

Q. Suppose he told you when you went to bid on this work, he was going to set the slope stakes so you would have to go up in the side of these hills and make deeper cuts, would the bid been the same as it would have been as a mere cast on the side?

A. Would have raised it; would have meant more work.

Q. Would you have agreed to do it for him for the same money?

A. No, sir.

Q. Would you want more money?

A. Want more money. Want more time.

Q. Now, so the Court will get this straight, before this contract was let you didn't go up on that work at all yourself, did you?

A. No, sir.

Q. The first time, as I understand, you went upon this work was after the contract had been made; is that true?

A. The contract was made.

Q. You had nothing to do with determining the prices or the amount of money you were to get, or to charge the Whitney Company, for building that road, did you?

A. No, sir, had nothing to do with that.

Q. Who did all that?

A. Rajotte.

Q. So when you were called in consultation, as you said at the Portland Hotel, to determine how you were going to do this work that was based upon information given you by Mr. Rajotte; is that correct?

A. Called into the Portland Hotel?

Q. Yes, when you had the conference over there and you were discussing ways and means of doing this work and the possible cost of it. Your judgment at that time was based on what was told you by Mr. Rajotte and others; isn't that true?

A. Yes, sir.

Q. Now, Mr. Freed asked you this question: If slight changes in the alignment of the grade—you know what I mean don't you when I say slight changes in the alignment—you know what I mean when I say that?

A. Change the line a little bit, not much.

Q. Yes. Now you said you understood at the time you were in the Portland Hotel that slight changes might increase the amount of work; you understood that at that time?

A. Yes, sir.

Q. Now, slight changes might change it from a cast proposition to a dumping proposition; isn't that true?

A. Yes, sir.

Q. It wouldn't take much change to change the character of the work, would it?

A. Yes, sir.

Q. A few feet might change any one of these cuts along this hill to a haul proposition instead of a dump proposition. Isn't that true?

A. Yes, sir.

Q. A matter of changing the line a few feet?

A. Yes, sir.

Q. Now you said that you were delayed considerably at the beginning of this work, and in order that the Court may have a better understand, I want to ask you this question: Isn't it a fact that you planned on putting your steam shovel clear across the creek, or up there in the beginning?

A. Yes, sir.

Q. And rushing it through a certain part of this roadbed—to get the matter clear in the mind of the Court—first find the Kilches River; about 234. Now isn't it a fact that you planned to get through along part of this in here before October?

A. I planned on getting through here before all the—there would be no cars used there; just steam shovel.

Q. Just a moment; isn't it a fact you planned on getting through all of that before the first of October?

A. Yes.

Q. And before any rains hit you?

A. Yes, sir.

Q. I now ask if this isn't a fact: That the character of the soil in this section is very different from the character of the soil in the upper end of that work?

A. This is the wettest part.

Q. Yes, wet, and what other conditions existed there?

A. From this point down is wet.

Q. Isn't it a fact that it is infested with springs?

A. Yes, sir.

COURT: That is the lower part?

MR. DOBSON: No, after you cross the river; after beginning to use the steam shovel.

A. The work up to Clear Creek is the wettest part of the whole work.

Q. About what station to what station? This is Kilches River. From here on? What one point is the wettest part of the work?

A. Between the two bridges.

Q. Between Sam Down's and Kilches River?

A. Yes, sir.

Q. I want to ask you if it isn't a fact that when you were considering this work that you had this situation in mind; in other words, you know what was the condition up there?

A. Yes, sir.

Q. And when you told Mr. Freed here a minute ago that you could have completed this contract within the time of six months, or five months or whatever it was, you had the first condition in mind, didn't you?

A. Yes, sir.

Q. I want to ask you this: In your experience, isn't it a fact that you have built many similar roadbeds, railroad beds?

A. Yes, sir.

Q. Isn't it a fact that you have built roadbeds twelve miles long or longer which would average even less than the amount of time you calculated to build this roadbed?

A. Yes, sir.

Q. And when you answered Mr. Freed's question, you were basing your answer upon your experience, were you not?

A. Yes, sir.

Q. And having in mind all these conditions?

A. Yes, sir.

COURT: Do you know how much shovel work was to be done before you reached the river?

Q. What the Court wants to know is this: Before you got to Kilches River about how much work was there to be done—shovel work?

A. Our calculation was just one cut.

Q. What cut is that?

COURT: How much yardage? Do you know anything about the yardage in this cut? Does it show on this profile?

MR. DOBSON: This is it, what we have been referring to as Cemetery Cut.

COURT: This 6856 yards, is that it?

Q. What the Court would like to know is about how long?

COURT: 1456 before they get to that.

MR. DOBSON: That is a cut, yes.

COURT: Two cuts making about eight thousand yards.

Q. What the Court would like to know, Mr. Fobert: How much time did you plan it would take to make these two cuts here had you gone right up there?

A. How much time?

Y. Yes.

A. How long it took to make them?

Q. Yes, about eight thousand yards.

A. They took about a month to finish.

COURT: What?

A. It took a month to finish them.

COURT: You expected to take a month?

Q. Took a month to go through those two cuts?

A. About that.

Q. Why did it take so long?

A. Awful mean cut; awful mean to get train.

Q. If you commenced there the 5th of October, or rather the 5th of August, you would have been out of there by the first of September, or thereabouts?

A. Yes, sir.

Q. You would have been ready to cross the river right after the first of September?

A. Yes.

Q. Going through that work from that point on with your steam shovel plant and doing this work in the manner you contemplated about how much progress could you make per day?

A. What point?

Q. After you crossed the river?

COURT: Do you know what quantity of material to be moved?

A. Moved with steam shovel? Cast supposed to be.

COURT: The yardage, do you have any idea about the yardage?

A. The profile shows that.

COURT: How do you know the aggregate amount?

A. Don't know the exact amount; figured about a month and a half to complete that work between the two bridges, one shift.

Q. So you would have been up there through the worst part of that work by at least October 15th?

A. Yes, sir.

Q. That is what you have in mind?

A. Yes, sir.

Q. Now what is the capacity of this steam shovel plant per day as a casting proposition?

A. Good casting or bad?

Q. Casting such as you were encountering after you got across the river up there.

A. The capacity of the shovel, steady work, steady casting about 3500 yards heavy work.

Q. What would you consider up there—heavy casting?

A. No, sir, light casting.

Q. Light casting what would you figure?

A. Light casting about two thousand yards; some days three thousand yards.

Q. You figure a fair average to do that work up there a thousand yards a day?

A. Two thousand yards a day a fair average.

Q. Now, I want to ask you this one question about the trestle. As I understand it the plaintiff in this case, the Rajotte, Fobert Winters Company, had nothing to do with building the trestles.

A. No, sir.

A. That was not part of their work?

Q. Is it a fact or not a fact that all of these trestles were filled or were any of them bridged or left in trestle or frame work; were any one of these points which are indicated on this profile as trestle—was it built as a trestle or was it filled.

A. What point?

Q. Upper end of the work?

COURT: End of the work.

A. Some trestles filled.

COURT: Were any of them put in as trestles?

A. Clear Creek and Sam Down's Creek.

Q. Those are bridges?

A. Bridges.

Q. I am talking about these trestles?

A. They were all filled.

COURT: No trestle?

A. All fill, your Honor.

Q. As a matter of fact there were only two bridges built up there on that work, that is Sam Down's Creek and Clear Creek?

A. Yes, sir.

Q. And all the rest of them are fills?

A. Fill

Q. Now, Mr. Freed asked you if it wasn't a fact that you couldn't have built this roadbed by merely casting the material over the side; that there were some places you couldn't have made your fill stick. Is that true?

A. Yes, sir.

Q. How many of those places; were there many of them or just a few?

A. I don't understand.

Q. Mr. Freed asked you if there were any points along this line, the upper end of this work, where you planned casting the material over the side, and making the roadbed by dropping the material from the upper side of the cut down to the lower level of your fill—whether or not there were not many places you

couldn't have done that because you couldn't make that material stick?

A. Two or three places you couldn't have done that; material wouldn't stick.

Q. Why did you say to Mr. Freed there were many places you couldn't do that? Do you want the Court to understand that all along the upper part of this work there were many places there you couldn't have done the work as you originally planned it because you couldn't make your fill stick? Do you want the Court to understand that?

A. I don't quite get that question.

Q. Now, we are looking at the profile, Mr. Fobert. Along up here you run into a number of fills. You say that you had planned when you started this work to cast the material over the side and build your roadbed on one side with the material you dumped over with the steam shovel on the lower side?

A. Yes, sir.

Q. Would you say that at all of these fills along here you wouldn't have been able to do that—to build your roadbed and make your material stick by simply casting the material down on this side?

A. Which station?

Q. Any one of them .

A. There is some places.

Q. How many are there? I wish you would point out on the profile how many places there you couldn't have done that. The Court got the impression there were a great many of those places you couldn't have done the work as you planned to do it.

COURT: I don't understand; perhaps it is my ignorance, but I don't understand how he could tell by looking at this profile just the location on the ground.

MR. FREED: I don't understand that either.

COURT: How can he tell or anybody tell by looking at this profile just where this line is to be located?

MR. DOBSON: The evidence shows that this line was not moved but a few feet one way or the other.

COURT: How can he tell by examination of this profile just where the fill—where the dirt will stick and where it won't.

A. I couldn't tell when I looked at it first time, no, sir. I can tell points here and there where the dirt won't stick because I was there.

COURT: You couldn't tell when you looked at it the first time. How could you tell when you did the work that it is not done on the line as shown on this profile?

A. How can I tell not done on the line the profile shows?

Q. Yes.

A. I can't tell that.

Q. If you took this profile and went out on the work, you wouldn't be able to locate that work at all, would you?

A. Locate that line all the way through.

COURT: Locate and build it?

A. No, couldn't build it, no, sir.

COURT: I don't know—I am not an engineer——

A. Your Honor, the right of way is cleared; it has lines run on the others, your Honor.

COURT: I know run through the others, but 'wasn't there a map of location that accompanied this?

MR. FREED: That is the map we have been speaking about they were supposed to receive; they say they didn't; we think they did.

Q. As a matter of fact, Mr. Fobert, did you ever have what is called a location map?

A. All we ever used was this; that is what you get on any railroad. That is all you get to go by.

Q. Suppose there had been no part of this road-bed out in the open and no part of it staked out at the time you went out there. Would you then tell the Court you could take this profile and locate any part of it?

A. I can't quite get you; explain that again.

COURT: Suppose somebody had given you this profile and said, "Now, I want to build a railroad beginning down there at the Southern Pacific Crossing and run up in the mountain eight miles."

MR. DOBSON: Mind you, there had been no clearing done, been no stakes set, no stakes you can be directed to to start from. Could you then locate the railroad from this profile?

A. There is stakes.

Q. That is just the point.

COURT: Suppose there were not; suppose they sent you down with just this profile and say, "I want

to build a railroad beginning at the Southern Pacific Crossing, wherever they commence, running out into the mountains." You had no lines at all, and no stakes on the ground at all.

A. No stakes on the ground at all?

COURT: Yes.

A. Yes, I can locate the line.

COURT: Locate the road from this?

A. No, not exact. I can locate just where it went there.

COURT: Wouldn't you have to have some point to start from?

A. Have to have; couldn't make a profile without it.

Q. Don't tell the Court then you could take a bare profile before there had been any clearing or any stakes set out there and locate this railroad. You don't mean that.

A. No, sir, the center line was run, was located. This railroad was located and the stakes set and we went along.

Q. What you want the Court to understand is this: There was center line stakes set when you went out to look.

A. Center line stakes set.

Q. Without those center line stakes you couldn't locate this?

A. No, not without.

Q. Now, the Court also asked you this question. How you could say at this time, from looking at this

profile where there were cuts made, and where there were fills made. How can you tell him that?

A. Here is a cut and here is a fill. Here is another cut. Here is a bridge. Shows that.

COURT: I understand that; shows a fill there and shows a cut. Above the line is a cut, below is a fill. But how can they tell by examination of this just where the material is to come from for that fill; just by looking at this profile?

A. By starting at the——

Q. No, no, you don't have to go back here. Here is a fill here. Now, you have to fill that up as you go along. Where are you going to get the material to fill that?

A. That cut there and that cut here.

Q. Can you read this right here?

A. Yes.

Q. What does that say?

A. Says 4230 yards.

Q. What is that word before it?

A. What was that? B-a-r.

Q. What does that mean?

A. Borrow.

Q. If you see that, you understand you would have to open up a borrow pit to make that fill?

A. Yes, sir; borrow from the cut to make it.

Q. In other words, you would mean this: That this cut up here at Station 250 didn't have enough material in the cut as laid out to make this fill?

A. Yes, sir.

Q. And you would have to open up what we call a borrow pit and take out more material than you would take out to make the cut for the roadbed to go through, in order to fill this place?

A. Yes, sir.

Q. What the court wants to know is how you can, at this time say where these cuts and fills were made, by referring to the profile.

COURT: And how he can tell that the dirt wouldn't stick as he calls it.

Q. To make that clear take this one here. Had you planned to make this with a casting proposition or would that be cut?

A. Planned to do all that work cast.

Q. Explain to the court how you can now say that this material if you dumped from the upper side of this fill, side of the hill down into this lower side, to level up your roadbed, how can you now tell the Court whether or not that material would stick there?

A. There wasn't no place here what the material would stick, because it was too steep.

Q. In other words, you fixed in your mind about the slopes?

A. Slopes.

Q. If it was a very steep slope, the material would not stick, is that it?

A. That is it.

Q. Were any slopes through here steep?

A. No.

Q. Where were the situation arise he just re-

ferred to of being unable to make the material stick if cast over the side?

A. We had a place above there.

Q. The fact is that was up where the slopes were steeper?

A. Straight up and down.

Q. That necessitated going up the hills further?

A. Straight up and down.

Q. To make that a little more clear, do you understand degrees?

A. Yes.

Q. For instance, I say the degree of a slope?

A. Yes.

Q. Can you state generally what the average degree of the slope was through this part of the work, from, we will say, Kilches River up to Sam Down's Creek?

A. Slope of the cut?

Q. Average slope.

COURT: Over the mountain.

Q. Running alongside the mountain.

A. Slope of the mountain?

Q. Yes, that you were moving along. What was the average, if you know?

A. I don't know that I could answer.

Q. You are not an engineer?

A. Not an engineer; couldn't answer that question.

Q. All you can say was it wasn't so steep?

A. That is all.

Q. Do you know what benching means?

A. Benching?

Q. Benching, yes; do you know what that means?

A. Yes.

Q. What would that have to do with some of these slopes that wouldn't stick?

A. Say you had a long slide here; say you were dumping over steep side of a hill, and the dump kept sliding, and to stop that slide, lots of places do that benching. You go down to where it would be required to keep the material from going down to the bottom and bench. The meaning of bench is to put a grade there for a shoulder. In other words, when the dump hits there it has got a shoulder, got a flat place there to hold it.

Q. That stops the slide?

A. That stops the slide.

Q. Now, then, is there any places up there where you couldn't have done that instead of going up into the hills?

A. Yes.

Q. There were some places where you couldn't even build that way?

A. Some places that couldn't be done.

Q. Isn't it a fact on many of these slopes you did just that thing, you benched?

A. I did some of that work on the railroad. Every time we worked.

COURT: What?

A. I have done some of that work.

Q. Down here; we are talking about it down here.

A. We done it in that work.

Q. You are sure about that?

A. Yes, sir.

Q. Now, Mr. Fobert, you didn't plan when you went down there moving all this yardage by steam shovel, did you?

A. No, sir.

Q. Isn't it a fact considerable part you planned to move by hand and teams?

A. Yes, had to make the time.

Q. I want to ask you one more question about these cross section stakes. As you moved along on this upper part of the work, isn't it a fact, or is it a fact that the defendant company, that is, the Whitney Company, had its engineer working right along ahead of you setting stakes, more or less? Isn't it a fact?

A. Yes, it is a fact.

Q. Do you recall whether or not there was a man by the name of Kraft? Do you remember Mr. Kraft, did you know Mr. Kraft?

A. Yes, sir.

Q. Was he there at that time? Did you ever see him up there setting stakes?

A. I saw him.

Q. See him frequently?

A. Mr. Kraft?

Q. Yes.

A. Saw him in the courtroom.

Q. No, no, up on the work.

A. Yes, sir.

Q. Didn't you see him quite often up there?

A. Yes, every day.

Q. Did you ever have any controversy with him about the setting of stakes?

A. I don't remember.

CROSS EXAMINATION

Questions by MR. FREED:

Q. Mr. Fobert, it is my remembrance that Mr. Rajotte said that you were in the Cemetery cut for two months.

A. I wasn't there.

Q. You weren't there?

A. No.

Q. Then when you made the statement to the court about the time that the Cemetery cut required, you really didn't know about that, did you?

A. I don't quite catch you.

Q. You told the court something about how long it took you to get through Cemetery cut.

A. I didn't tell how long it took me. They asked me how long I thought it would take me to do the work.

Q. Oh, you were just speaking what you thought it would take?

COURT: Does he state a month?

A. I told him as near as my knowledge, my experience.

Q. What did you say, do you remember?

A. I told them about a month.

Q. Therefore, if the records show that it actually took you, your company, two months to do the work which you figured you could do in one month, then would you say you were making just half the progress you should have made?

A. Explain that again, please.

Q. You told the Court that you expected to get through Cemetery cut in a month, to do that work in a month?

A. Yes, sir.

Q. Now, if it turns out here, if the records show that it took your company two months to do that work—

A. Yes, Cemetery cut.

Q. I say if it does, you don't know anything about it you say, but if it did take them two months to do it, then they were working just half as fast as they should?

A. If they didn't do it in that time, took double the time, took longer than they figured, certainly.

Q. Now, if you plan to do all that upper part of the work by dumping—you know you told the court that you planned to do dumping up above, Mr. Cole had told you all that work up above Sam Down's Creek—I think—would be dumping work—

A. No.

Q. Who told you? Did anybody tell you?

A. No.

Q. There was part of that work you planned to do dumping work entirely?

A. Part of that work.

Q. Some parts along the roadbed you expected—

MR. DOBSON: Dumping and casting are two different things; if you are asking about casting.

MR. FREED: I am asking about dumping. All he has to do is to say no if he understands the word.

Q. Let me ask you this, if you don't understand that. What about casting. Certain parts of the line upon which you expected to do casting only, isn't that so?

A. Yes.

Q. What part of the line was that? Don't show it to us, what station?

A. Between the bridge crossing the river and Clear Creek.

Q. That is Kilches River to Clear Creek?

A. Wasn't supposed to take any cars across there at all.

Q. If that was to be—

MR. DOBSON: Just a moment. He says he didn't figure taking cars at all. What do you mean taking cars across there? Tell the Court what kind of cars you had reference to. You mean dump cars, don't you?

A. Dump cars; the cars hauling material down.

MR. DOBSON: Hauling material out of cuts.

Q. Then why did you bring your dump cars up on the job at that point? You had them ready to bring up on that part of the job, didn't you?

A. They were on the work.

Q. If you were going to do casting only at a place you wouldn't have any need for your dump cars, would you?

A. No, sir.

Q. Didn't you have your dump cars ready to do your work at that point?

A. I didn't get you.

Q. If you are going to do a cast job, you understand?

A. Yes.

Q. No dumping. If you are going to do a casting job, you would have no need for your cars, would you?

A. No.

Q. You wouldn't need any dump cars?

A. No.

Q. Now, part of this work you said you had planned to do by casting entirely?

A. Yes.

Q. You said that was between Kilches River and Clear Creek?

A. Yes, sir, supposed to do all that cast by shovel; no car at all.

Q. Did you, or did you not bring your cars up ready for use at that point?

MR. DOBSON: He wasn't there.

A. I wasn't there.

COURT: You were there when they began work across the river, weren't you?

A. No.

Q. Where were they working when you came up?

A. Around Station 270.

MR. DOBSON: That is where they were when you went up?

A. That is where they were when I went up.

COURT: What is the station at the river?

A. The river is Station about 234.

Q. You don't know anything about that?

A. I don't know anything about that.

Q. Now, Mr. Fobert, if it took your company two months to go through Cemetery cut, do you think that they could finish that job in four months, the whole roadbed in four months?

A. You can't base that on Cemetery cut. That was the meanest cut in the whole line. You had to go up just like trying to climb over the top of that house, and taking material down in a hole. You can't classify that with the whole work.

Q. If it took you two months to go through that cut, you still mean to tell the Court you could have finished that work by January 1st?

A. I didn't figure two months; I figured thirty days.

Q. I understand that; if it did take two months—

A. I don't know how long it took.

Q. When you told me a while ago you could finish that work by January 1st, you were figuring only one month for Cemetery cut?

A. Yes.

MR. DOBSON: I can give you the dates of that cut. We went in the cut on September 10th; went out October 7th.

MR. FREED: That didn't take two months then.

MR. DOBSON: No.

MR. FREED: I haven't that record—my record. I will drop that temporarily, but I will check my records.

Q. Now, Mr. Fobert, let's turn to Station 390 here. I want you to show the Court the difference between this profile before you reach 390 and after you reach 390. I asked about that yesterday but didn't seem to get very far. What are these words down here, just below, along 380 at the bottom?

A. Projected line.

Q. And this—that is projected line?

A. Project.

Q. Now do you understand then that up to Station about 378 this profile shows that the line was located on the ground? That is a fact, isn't it?

MR. DOBSON: We don't dispute that.

Q. This profile showed you gentlemen that beyond about 378—

A. I can't get you.

Q. What does this projected line mean? What do you mean by projected; what does the words projected line mean to you as a contractor?

A. It isn't exact line.

Q. What is it?

A. It isn't exact line. Profile does not show it exact.

COURT: Is not the exact line?

MR. DOBSON: Isn't that paper location?

MR. FREED: Mr. Dobson, I am trying to keep my patience but you can't lead him while I am questioning.

Q. This shows you, does it not, that beyond Station 378 you had no right to believe that this line was accurate?

A. I don't know "believe".

Q. You knew then?

A. I don't know the line before the contract signed at all.

Q. But anybody—you or Mr. Rajotte or anybody else looking at this profile map when it shows that from 378 on this line was only projected—was only projected from 378 on, that shows you, doesn't it, that the line appearing on this map with cuts, fills, etc., was merely down on paper?

A. Down on paper.

Q. And had not been on the ground?

A. And had not been on the ground.

Q. And don't you know, and didn't you know, and shouldn't Mr. Rajotte have known that when you start to locate a line on the ground from a projected paper location that there are necessarily a number of changes to be made?

A. Yes, sir.

Q. That until you have located it on the ground you don't know whether you are running up a hill or down a hill at that point; that is whether the loca-

tion is thrown up a hill or whether the location is thrown down a hill?

A. I don't know.

Q. You couldn't tell at this point whether you were one mile from the top of a hill, or whether you were a mile from the bottom of the slope, could you? Just looking at this—just looking at this and knowing it was a paper location?

A. No, I couldn't tell you how high the mountain was.

Q. No, I don't mean the height of the mountain. You know that this is only a paper location or projected line. Now, could you look at this paper location or projected line and know whether or not, when that was finally located—you understand?

A. Yes, sir.

Q. —it would be—here is the side of a hill; we are running along here—whether it would be run up here or down here; could you tell? Could you tell whether that was going to run here or was going to run here, just from looking at that?

A. Me on the work or just looking at that?

Q. You sitting right here; that is all you have seen; just right here.

A. This profile tells the yards of that cut; be in side hill and by the yardage of that cut we know would be.

Q. I know, but could you tell whether or not when you ran that out you were going to strike a place where the fill wouldn't hold?

A. No.

Q. You couldn't tell that?

A. No, no, no.

Q. When Mr. Norris went to run out the line here, if he tried to follow it exactly you couldn't tell whether you were going to strike a place where the fill wouldn't hold, could you?

A. No, sir.

Q. Nobody could tell?

A. No, sir, in places you can't tell.

Q. I mean from looking at this. No human being could tell.

A. I couldn't tell, no. If you was building could tell.

Q. Holding this up—knowing this is the ground along there, and holding this in front of you, knowing only a projected line, no human being could tell when you located a line there whether you would strike a place where the fill would hold or wouldn't hold, could you?

A. Not by looking at the profile.

Q. Of course if this was level ground along here, would know he was going over level ground?

A. Yes, sir.

Q. But here is a big hill.

A. Yes, sir.

Q. Here is a hillside?

A. Yes, sir.

Q. That is what I am talking about.

A. Yes, sir.

Q. And you know this line was only projected?

A. Projected line.

Q. Now, I want to ask you, is it the custom—I don't mean custom, but isn't it usual, when you go on a job that you want to see the location map?

A. No, sir.

Q. Consult your location. This is a profile. I am talking about location map.

A. That is all I ever had; that is all I ever seen.

Q. When you figure on a job, do you figure on profile without location map?

A. I don't figure on it.

Q. You don't figure on it?

A. No, never.

Q. The location map is a map that shows you where the road is actually going to run, isn't it? That shows you whether going to run uphill or downhill; I mean run along the top of the hill or run along the bottom of the hill—that shows you.

A. That is all I ever saw. My part—my work was—that is, as far as looking after the work, actual work on the job has been my part, all the time on the work; figuring the work is up to my partner.

Q. That is, Mr. Rajotte figured what he thought he could do, and it was up to you to do it?

A. Yes, sir.

Q. You didn't, before the contract was let, sit down and really figure out yourself what this profile map meant, did you?

A. Look at the profile and figure out and tell you so many yards on the job?

Q. He told you?

A. Yes.

Q. He didn't tell you that the chief engineer—that the contract said the chief engineer can vary this?

A. He didn't have to tell me; I knew that myself, from my experience.

Q. Didn't you think, when you went on the work, you would have much more yardage to move?

A. I never thought a logging road would increase the yardage. Logging roads usually build as cheap as possible.

Q. Take that cut, just before reaching Kilches River; you told the court before you reached the Kilches River there were only two cuts, the Cemetery cut, and the one just previous to that, that you were going to use the steam shovel on, didn't you?

A. Yes, sir.

Q. How were you going to make that cut just before you reached Kilches River? Just turn to Kilches River, 230; just beyond Kilches River. Now, how were you going to make that cut—by hand?

A. By hand, pick and shovel, and a little car.

Q. Is that the best way to make a cut like that? Were you going to make that cut which calls for 3084 yards, were you going to make this steep cut by hand?

A. Yes.

Q. Now, what was the material in that cut?

A. Solid rock.

Q. And you mean to tell the Court that in that place you were going to move 3,000 yards of solid rock with a straight up and down pick by hand?

A. Yes, sir.

Q. And yet when you come to material on the upper parts of it, where the cuts were less steep, and less material to move, there you were going to do your excavating with shovel?

A. Just a minute. I understand that. This is solid rock, your Honor, straight up and down, and has to be shot, hasn't it, has to be broken up by powder. This cut is a short, steep, straight up and down, and just a point sticking out of solid rock, and have holes put in it, and blown, break the rock with powder. When the powder broke that rock, instead of being—what is the yardage there—two-thirds of that rock was going to be off the cut altogether. There was no other way to break that rock. If I put enough powder under one corner of this building to take a piece of this building about sixteen foot wide, the powder aint going to raise that building up in the air, and set it back in the same place again. That building would be scattered all over. There was no other way to do that. Very little work left for hand, to be done.

Q. You intended to do by hand anyway, you say?

A. Yes, sir.

Q. Did you do it by hand?

A. Wasn't much left in that cut after had to be moved.

Q. Did you do it by hand?

A. No, I wasn't working up there.

Q. Now, will you tell the Court how much yard-

age a day did you move when you were casting with your shovel? Just an average day?

A. When I was casting?

Q. Yes, what yardage?

A. Whereabouts? What job? What place?

Q. Pick out three or four places if you want to. I want to average it. You know what average is. I am willing to have you pick out three or four places to show the Court.

A. Was only one place where done any casting on the whole job.

Q. What did you do then? How much a day did you cast? What yardage did you get rid of in that job, if that is the only place you did?

A. I didn't keep track of that.

Q. At what point was that?

A. Where we finished up, the last place.

Q. Unless you want to turn to it, don't do it for me. Have you any idea—

A. Was making about between three and four hundred feet a day as we cast.

Q. Were casting three or four hundred feet a day?

A. Yes, sir.

Q. You were making that much progress, you mean? Is that what you mean?

A. Ahead there.

Q. You mean you were moving ahead on the line three or four hundred feet a day?

A. Just for two or three days.

Q. Would that be an average progress that you

would make? Would you go ahead about three or four hundred feet a day all along the line if they would let you cast?

A. Some days you wouldn't be able to make quite that much; others days you beat it; make over 400 feet.

Q. Suppose you had been allowed to cast, if they had built the road so you could have cast, about how many feet a day could you have made, do you think?

A. On an average?

Q. Yes.

A. What distance will you give me to do that work?

Q. Take an average.

A. Average casting?

Q. Take about the kind of work you had to do here.

A. That all depends on how much I can cast over. If I had places where good casting, wouldn't go so far ahead; in places level to cast you make a thousand feet.

COURT: Suppose you had done this work the way you say you planned to do it by casting, as you call it. How much progress would you make, average a day?

A. We could move average in yardage, you mean?

COURT: No, no, in distance?

A. Length? Just as I say, some day you could make—

COURT: An average now. You say you planned to do this work by casting after you crossed the river; from there on up all to be done by casting; no car work at all. When you made that plan, did you make an estimate of the progress you would make? How many feet of track or grade you would build each day?

A. Tried to get ahead, yes, sir.

COURT: How many?

A. Around four hundred feet, around there; may be a little more, may be less.

Q. But you think you would average four hundred feet?

A. Oh, we went fast there; in places some days I would beat that. Other days I wouldn't near do it.

Q. Do you know what average means?

A. Average from end of that point.

Q. So from Kilches River up to Clear Creek—

COURT: About how far is that?

A. Six thousand feet.

Q. Is it about two and a half miles?

A. Nine thousand feet.

Q. Now, I believe you said you didn't know the answer to this question, but I want to be sure; part of the work you did by casting. In one place you say you did some casting?

A. Yes, sir.

Q. Now, do you know how much material you actually moved a day when you were casting?

A. No.

Q. Well, some record was kept of that? Your firm will know, will they not?

A. I don't think so.

Q. What?

A. They wouldn't know, I don't think, because I don't know.

Q. If you didn't make a record, who would make a record? Would any of your company make a record?

A. No.

Q. Why didn't you keep record of that?

A. They didn't keep the record of me; never had an estimate all the time was on that roadbed. It was that map.

Q. Didn't you keep a record of the dirt you hauled out?

A. Not me.

Q. Who did?

A. The bookkeeper; timekeeper.

Q. The timekeeper stood there and kept a record?

A. No, he didn't stand there. When the car was taken out and hauled, it was turned in to him; number of cars was turned in to him. Just a minute. Every day the bookkeeper knew where that shovel was, each station the dirt was hauled with those cars, what station the shovel was at.

Q. So they would have a record then of the yardage you actually moved by cast?

A. No.

Q. You won't have any of the casting yardage?

A. No, no record of that; no, sir.

Q. Then if it turns out at this trial that in fact you cast much less than three thousand yards a day, many thousand yards less, then your estimated average of three thousand a day was wrong?

MR. DOBSON: He said two thousand.

Q. What did you say you thought you could average a day casting? How many cubic yards of material?

A. The little bit of casting I done I already told you I was casting there two or three, very light.

Q. You don't get my question. If you had been allowed to cast along this work, about how many cubic yards of material do you think you could have cast a day?

A. As I told you awhile ago, it depends on the cut.

Q. This profile, you have the profile? You say you can tell from that almost anything. If you had followed this profile and been allowed to cast every bit of material, what could you have averaged a day in casting, you say? I think you have answered; I am not sure—I am willing to take your first answer.

A. I don't think I answered that.

Q. Well, answer it now, sir.

A. I can't.

COURT: You said about two thousand yards.

Q. Is that right? Do you think about two thousand yards?

A. Yes, two thousand yards.

Q. Then if it turns out that when you did cast,

you cast much less than two thousand yards a day, you must have been going very slow, isn't that right?

A. You don't get it right yourself. The little bit of casting I done it ahead.

Q. How long was it? How many days?

A. Just two or three days; I don't know if two days or three; might be more; might only two days.

Q. Was that easy work or hard work to cast?

A. Just good yardage.

Q. Was it easy or hard?

A. Easy.

Q. Then you should have cast more yardage on that part of the job. You should have been able to do more a day there than you could have done down on this hard work where they didn't let you cast. Is that right?

A. I can't get you.

Q. You did three or four days of casting, didn't you?

A. Yes, sir.

Q. Keep your mind on what I am saying. I won't trip you up. You did three or four days casting?

A. Yes.

Q. Now, we, I think, have a record of what material moved during that time.

A. Yes.

Q. You understand. I might be mistaken, but I think we have. Now, you say that there was easy casting at that point; that is, easy work to do. You could cast a good deal at that point, couldn't you?

A. Could cast a good deal; it wasn't necessary to cast much.

Q. Didn't you cast for three days?

A. Just a minute. The casting I didn't—it wasn't wide enough. I had a little grade along there for the dinky track. Wasn't enough to come off there—in the first place, that fill was all made too, and was a little bit of a hole in here. I went ahead with the steam shovel, and took up yardage left along there; very little work and dug into the hill a little bit more with my shovel to get a wider; steep bank from the river; here a little fill. I went ahead and carried my dinky track with steam shovel, and what material was to come along that side hill at the same time. So you can't put that as all casting for roadbed.

Q. Then you didn't cast for three days for the roadbed?

A. No, just a few hours; the rest of it was making—saved making trestle for this light fill, and saved making grade for the dinky track. The second place was waste in that cut, was more material than we needed; waste and taking my dinky track at the same time with the shovel, we could do quicker, better job, cheaper.

Q. You weren't asked the reason.

A. You can't take a little bit of work like that and make an average.

Q. You say you didn't spend over two or three hours at a time casting?

A. Spent more. Might spend a whole day, as near as I can remember now.

Q. Do you think you spent a day casting at one time? You said cast a little point for a cut there, a thorough cut, and then grade it.

A. Yes, just a little then.

Q. Just answer the question. You know what I mean.

A. Yes.

Q. When I say, did you do a day's casting right at one time; at one time cast with that shovel for one day. I just want to get it. Did you cast for at least one day with that shovel?

A. On that one place?

Q. Any place. Anywhere on the line did you cast for one day?

A. I told you I cast for two or three days. I explained to you what it was done for. Was some of that material was taken out of the cut, and some of it—

COURT: Were you casting all the time during those two or three days?

A. Yes, sir.

COURT: All the material you moved was cast?

A. Was cast.

COURT: That is all right; it doesn't make any difference what you did with the material.

A. What I want to get at, I don't want you to try to switch off that and get cast and cast for the roadbed, because most of that work was done to avoid doing so much work to build a trestle; instead the cut was short, was a short cut.

Q. I understand. You mean, Mr. Fobert, that

all of that was not good casting. I ask if all of it was easy casting.

A. It was easy casting. Wouldn't all have to be done. Lots of that stuff was waste.

Q. But could you cast as much—I don't care what you used it for, or what you did with it—could you cast as much at that point during those three days as you could during any other three days cast along the line? Was that a good average three days cast? Did you move as much material during those three days casting?

A. No, it wasn't good; it wasn't.

Q. What about it?

A. Because we moved some material to get through we didn't have to move; it holds you back.

Q. I don't mean your progress on the line.

A. As I told you this casting along there was poor casting.

A. It was slow work.

Q. You mean you couldn't move as much material? Is that what you mean to say?

A. No.

Q. What was it—rock or dirt?

A. Rock and dirt both and stumps.

Q. You didn't have any trouble picking them up with the shovel, did you?

A. No, didn't make any difference. What you hit comes; a boulder as big as half this room.

Q. Could you cast as many yards of that at that point—could you cast as many yards there as you

could have back further if Mr. Norris had let you cast?

A. There was no place back there to cast.

Q. Suppose you had built the road so you could cast?

A. So we could cast? Suppose you suppose; you suppose in there. I can't tell you what I could do with the work when I didn't do it, and no plan of any kind for it.

Q. Suppose the roadbed had been built exactly like this blueprint. You say if built exactly like this blueprint—that is my understanding of what you say—much of it would have been cast work.

A. I tell you right back here the profile wasn't exact. Just kind of located.

Q. That puts a new light on it. How did you know, then, you were going to be able to do cast work?

A. Thought it run along the side of the hill.

Q. You thought, therefore, that since you were running along the side of a hill that you would naturally be able to take the dirt you dug out from this side, the hillside, and throw it over on the downhill side?

A. Sure; lots of it.

Q. Why were you not able to do that in actually building that road? Why didn't you do that?

A. Why, they built a better road.

Q. What did they do? I don't think the Court—

A. What did they do? I don't know what the engineer did.

COURT: You know how they built the road?

A. Yes.

COURT: That is what counsel wants to know.

Q. Why couldn't you have cast the way they built the road?

A. Because I couldn't.

Q. Why?

A. Because they had the cut and fill—they run cut and fill to balance; fill had to be hauled.

Q. In other words, you needed the material that you were cutting out—is that it?

A. Had to get in the fill yes; had to go in the fill every bit of it.

COURT: The material you took out of the cut you put in the fill?

A. Yes, sir. Now, your Honor, we will say this building here is the hill, and from this floor here, we will say that the floor is the grade and the building is the cut and fill. Say the fill is sixteen, twenty feet wide. This cut—half the roadbed is cut, may be a little more, may be two thirds, places more, places less, all guesswork. You go to work, and you take this cut over here and shovel, and throw it over the bank of this; throw it right over the bank. Say this is the bank, this wall; this building outside. You take all this material here and throw it down there and make your fill there. Material comes up from the floor and makes that roadbed full wide by taking half of this building out, and throwing it down there. Puts this half of this material here down the other side of this cut and fill.

COURT: That is where there is material enough in the cut to make the fill.

A. Instead of doing that, some of these cuts that we figure were going to be done we run a cut right straight around through the building where it had to be taken out by car; track placed low on the grade and hauled to these fills, and make the fill.

Q. Well, that was caused by moving the line further up into the hill?

A. That was caused—just a minute. I don't quite get you.

COURT: Was that due to the fact that the line was moved, that you had to do that extra work?

A. No, I couldn't see—just a minute, I don't understand you. It was due, as near as I can tell you, my knowledge to having to build a better line.

COURT: I know; that is all right, but did they move the line?

A. Lots of places the line was moved; made thorough cut instead of these side hills.

Recess until 2 P. M.

Portland, Ore., Friday, Oct. 26, 1923, 2 P. M.

ALEC FOBERT resumes the stand.

CROSS EXAMINATION

(Continued)

Questions by Mr. Freed:

Q. Mr. Fobert, does the profile map which you have that had been given to Mr. Rajotte—you know that profile map that you have been using?

A. Yes, sir.

Q. Does that profile show whether or not a cut is a thorough cut or a side cut?

A. That profile that was given to Mr. Rajotte, you mean?

Q. This profile here. This exhibit in the case, the one you have been looking at all morning?

A. Yes.

Q. Does that show there whether a cut is a thorough cut or a side cut?

A. Would it show if this was a thorough cut or a side cut?

COURT: Can you tell by looking at the profile whether this was a thorough cut or a side cut?

A. I aint so sure about that.

Q. Take this profile. Let's get a cut anywhere, I don't care. Take this. Take a cut. I am pointing out to you now a cut shown between Stations 280 and 290 as an example. Does this profile show whether that cut is meant to be a thorough cut or a side cut? Is there anything on this profile to indicate to you what kind of a cut that is?

A. That is, if it is side or thorough?

Q. Yes, as there. Can you look at this cut here now—this shows a cut, doesn't it?

A. Yes.

Q. Can you look at that cut, and from there tell whether that was intended to be a thorough cut or a side cut?

A. If I am on the ground I can tell.

Q. But take the profile, just looking at the pro-

file, does the profile show that? You know whether it does, Mr. Fobert? Don't you understand my question?

A. Yes, I understand.

Q. Then answer it.

A. I am just trying to see how I can answer that. This part of the profile—

COURT: That shows a cut, does it?

A. Yes.

COURT: Can you tell from looking at that whether a thorough cut or a side cut?

A. Says here 1930 yards cut, that's what it says.

COURT: You can't tell?

A. I can't tell by just looking at the profile at all. If I seen the work, I could tell.

Q. I am not asking that. Now, the second question: If you had been able to build this roadbed as you thought you were going to, and been able to cast all that excavation that you spoke of, wouldn't that material have been waste?

A. Some of it.

Q. What percentage of it? A large part or a small part?

A. I couldn't tell you just how much.

Q. Well, was it a large part of it? Would most of it have been waste?

A. Quite a bit in some points, waste.

Q. Would you say most of it would have been waste?

A. No, not very much.

Q. What part?

A. There would have been some waste on it.

Q. You can't tell how much?

A. No, I could tell how much.

COURT: How far would you move the material when you cast?

A. Just pick it up with a shovel, and swing and dump.

COURT: How far could you move it? What was the distance you could have moved material by casting?

A. I could swing in the bank, get my material there, swing over, and dump over here.

COURT: How far could you move it from there, from where your shovel stood?

A. Around fifty feet around there; maybe sixty.

COURT: And if you had to move it more than fifty feet, you would have to move it in some other way; couldn't move by casting?

A. Yes, sir.

COURT: But wasn't any material moved more than three hundred feet, was there?

A. Yes, lots of it.

COURT: Contract says estimated overhaul of 175,000 yards.

MR. DOBSON: 166,000.

COURT: 166,000 yards overhaul estimated in the contract.

A. I aint familiar with that figure. I don't know anything about that part.

COURT: That was material that was to be moved more than three hundred feet.

A. Some of it, and some moved less than that.

Q. If it was under three hundred feet, you didn't get pay for it?

A. Get paid for what was over three hundred feet.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Mr. Fobert, could you go over that line today and see where that material has been wasted? Mr. Freed referred to waste material. Could you tell, by going over the line today, where that material was wasted?

A. Yes, sir.

Q. Have you been over the line recently?

A. Over last Monday.

Q. Any evidence of a great amount of waste material? Any idea about how much waste material shows on that line today?

A. No, I haven't.

Q. Well, is there a lot of it, or just a small amount?

A. Isn't very much.

Witness excused.

LYMAN GRISWOLD, A witness called on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. DOBSON:

Q. Will you just state your business?

A. I am a civil engineer.

Q. Where are you located?

A. Portland, Oregon.

Q. Did you take a course of training in some college?

A. I am not a collegian.

Q. Are you a registered engineer?

A. Yes, sir.

Q. How long have you been an engineer?

A. About twenty-three years.

Q. During that twenty-three years, Mr. Griswold, what has been your general experience with respect to construction work which would have any similarity to the work under discussion here?

A. I have constructed railroads and highways.

Q. Just tell the Court briefly the number of railroads and highways constructed; briefly as you can.

A. I was on construction of the S. P. & S. Railway, the Spokane International, Spokane Inland Empire, Chicago, Milwaukee and St. Paul, Oregon Trunk and the Oregon Electric.

Q. Any highways.

A. Yes, had charge of the location and construction of the Columbia River Highway between Portland, Astoria in Clatsop and Columbia Counties, and a highway constructed near Biggs, Oregon, the Nehalem Highway, on the Nehalem River, Columbia

and Clatsop Counties, connecting highway between Clatsop and Tillamook Counties and other highways.

Q. I am going to ask you whether or not you ever saw the roadbed constructed by the plaintiff in this case and now in controversy here?

A. Yes, sir.

Q. When did you go over that roadbed?

A. Tuesday of this week.

Q. Did you go from one end to the other?

A. Yes, sir.

Q. I will ask you this, in going over that road, you were able to see the nature of the construction required?

A. Yes, sir.

Q. Would the engineering question involved in the construction of that road, or the contractor's problems in the construction of that road differ materially from the construction of the roads you have had experience with?

A. No, sir.

Q. And you are familiar with the general contour of the country where this roadbed is built down there, are you?

A. Yes, sir.

Q. Now, that the Court may more readily understand some of the questions discussed with Mr. Fobert, we have here some putty illustrating some of these cuts and fills, and I am going to ask you to show the Court how a fill would be changed from a fill to a cut.

MR. FREED: May I interrupt counsel? I may want to object to this witness testifying at all. What are you seeking to show the witness?

MR. DOBSON: His testimony is in the nature of expert testimony, and I think it is perfectly competent to explain the character of the work we were undertaking to do down there, and whether possible to do the work as we contend we understood we were to do it. That is one of the principal matters in controversy in this case.

MR. FREED: This witness does not claim that he was there before you built the road?

MR. DOBSON: No, but he saw the general contour of the country.

MR. FREED: Now, after built?

MR. DOBSON: Yes.

Q. Would that make any difference, Mr. Griswold, as to your determining as to the proper method or best method or method in which it could be constructed, whether you had seen this country before? Would it make any difference?

A. No, sir.

MR. FREED: I object to any testimony from this witness as to what could be done and what couldn't be done.

COURT: We will hear what he has to say subject to your objection; I think going pretty far afield.

Q. Just in your own way, Mr. Griswold, just as briefly as you can, first demonstrate there if you can,

the manner in which you would change a fill to a cut, how that could be done?

A. I didn't make this model, but I think I can explain. (Witness illustrates with putty model.)

Q. You can shape it any way. It is understood this is not supposed to represent any actual cut there, but just as an illustration.

MR. FREED: It is understood I am objecting to it on that additional ground.

A. Well, this represents a hillside. Now, if the line is projected through in this manner, you would have a fill from here to here across this opening. If thrown into the hillside we would have a cut as that is shown there; that represents a cut of the roadbed or part of the roadbed in the hillside.

Q. That would merely mean, Mr. Griswold, that you would move the line over here, and take out a cut here, and put the roadbed on the ground where you removed it?

A. Yes, sir.

Q. In other words, if the roadbed were over here, there would be no necessity for a fill?

A. Yes, sir.

Q. That would involve moving this material over here?

A. Yes, sir.

Q. Now, would that operation in any way interfere with the casting proposition as compared with a hauling proposition?

A. It could.

Q. Would it be necessary to make a hauling

proposition as compared with a cast proposition to do that?

A. If it were thrown over into the hill haul might be required. That would be especially true if this cut—if the material from this cut would be required to make a fill down here at one end of that cut. If it were a simple cast proposition, consisting of moving this material and casting over the side to make a fill alongside, would be no haul involved.

Q. Now, in going over that roadbed I understood you to say you went from end to the other?

A. Yes, sir.

Q. Could that roadbed have been built through there without making a number of what was called thorough cuts?

A. It couldn't have been done on the center line as now there.

Q. Take now the condition of the country through there, the contour of the hills, could it have been built through there as a cast proposition compared with a haul proposition?

A. Yes, sir.

Q. And what would you say as to whether or not it could have been built, a substantial roadbed could have been built, in that fashion?

A. Yes, it could have been done.

Q. One other question; you have been engaged in this railroad contracting a good many years?

A. Yes, sir.

Q. Then there is some reference made to maps here,—location maps—or not location maps, but

maps or plans as distinguished from a profile. Do you know what I mean? What I refer to?

A. Yes, sir.

Q. Is it customary in work of this kind to furnish contractor with a map other than a profile?

A. No, sir.

Q. Now, Mr. Griswold, do you ever have to do with the letting of contracts or dealing with contractors in your experience?

A. Yes, sir.

Q. I will ask you to state when a contractor undertakes to figure on work of this character such as you saw done here—

MR. FREED: It is understood, my objections go through all of this.

COURT: I understand.

Q. Does he take into consideration merely information given him by profile or does he consider something else?

A. He considers other sources of information.

Q. What other sources does he consider?

A. Consults with the engineer in charge of the work.

Q. To what extent can he depend upon the information given him by the engineer?

A. The contract usually provides that the engineer may change the line, but it is customary for the contractor to ask an engineer if he intends to change the line, and if so, what changes he expects to make. Further, he asks him regarding original material; in the case of rock cuts he asks if he will let him use

what we call coyote holes or will insist on the use of down holes, and he asks in general such questions as he thinks are necessary to learn just what the engineer wishes to have done.

Q. That is for the purpose of determining how the contractor can do the work, is it not?

A. Yes, sir.

Q. So the profile is not the sole guide?

A. No, sir.

Q. Now, Mr. Griswold, in work of this nature, what is the custom as to whether or not the contractors on the work are furnished with the yardage as they move along?

A. They are usually furnished with estimates of yardage each month, what is called a monthly estimate?

Q. That is the yardage they have moved?

A. Yes, sir.

CROSS EXAMINATION

Questions by MR. FREED:

Q. Mr. Griswold, are you now a practicing engineer?

A. Yes, sir.

Q. Are you not appearing in this case as a paid expert?

A. I am.

Q. Isn't that a part of your business, to give expert testimony for contractors?

A. For anybody that wants it.

Q. Don't you do that a great deal?

A. Yes, sir.

Q. In these cases of controversy between contractors and other people, you very often give expert testimony?

A. Yes, sir.

Q. And you are paid for that?

A. Yes, sir.

Q. And that is your province in this case?

A. Yes, sir.

Q. When you went down over that ground on Tuesday, who went with you?

A. Alec Fobert.

Q. Did you carry a profile map with you?

A. Carried a profile.

Q. What profile?

A. Carried photographic reproduction of this profile in evidence.

Q. Where is that, sir?

A. I haven't it with me.

Q. Who has it?

MR. DOBSON: Can you get it?

A. No.

MR. DOBSON: Just explain why.

MR. FREED: Just a moment; you can't coach him on the sideline.

MR. DOBSON: I didn't intend to, Mr. Freed, I didn't intend to.

Q. You can't produce it, you say?

A. No, sir.

Q. Somebody else has it?

A. No, sir.

Q. Anybody in the courtroom?

A. No, sir.

Q. Did you have any other paper with you?

A. Than this profile?

Q. Yes.

A. No, sir.

Q. How much of the territory did you cover?

A. We covered it all; that is, I say all; the last station we were on was around 570; somewhere in that vicinity.

Q. You covered everything from Station 1 to Station 570?

A. Well, I believe it starts at Station 100.

Q. Well, Station 100?

A. Yes, sir.

Q. Did you cover anything in Mile A, that is, from O back?

A. Yes.

Q. What means of location did you use?

A. We walked over this Mile A and we walked from the Southern Pacific crossing—

Q. Where is that? What station?

A. Station 100, the beginning of the line eastward, and we walked from there to the Station at 205 or 210. I don't know exactly; we took a train and went from there to the upper end of the works; we got off at the upper end and walked over—

Q. The upper end is about what station?

A. I think the trains stop about 550, if the stations were given right, anyway, building a tram-

way there, then I walked from that about, I think, about four miles down the hill.

Q. Four miles back?

A. Back towards the Kilches River, and then the rest of the distance from there to the Kilches River made on speeder.

Q. In other words, how much of the track did you cover on speeder?

A. I would say, about two and a half miles, perhaps. I am not sure about that.

Q. How many miles did you cover on foot?

A. About six miles.

Q. Covered about six miles by foot? And you covered approximately two and a half miles by speeder?

A. Yes, sir.

Q. How fast was the speeder going?

A. I don't know, probably about fifteen miles an hour.

Q. Did you have your profile open while you were doing all that, looking at it?

A. Yes, part of the time, not all of the time.

Q. What about when going along fifteen miles an hour on a speeder, were you unrolling your profile as you went along?

A. Not at all.

Q. On that two and a half miles you covered on the speeder you did not have your profile open?

A. No.

Q. When you were walking along there six miles did you have the profile open?

A. Yes.

Q. As you walked from station to station you unrolled the profile?

A. Yes, sir.

Q. How long did it take you to walk that six miles?

A. We were on the work about eight thirty in the morning and we reached Kilches River between two and three o'clock. We were on the line probably five hours.

Q. And during that five hours, you covered the six miles on foot, examining the way in connection with the profile, and then went over the two and a half miles on a speeder?

A. Yes, sir.

Q. As I understand, you went to the upper end on a speeder and then came back? That is, this was additional travel done on the train, you say, and not on the speeder?

A. Yes, we went up the line by train.

Q. For my information, what do you mean, a logging train? It wasn't a passenger train?

A. No, it was logging.

A. They don't run passenger trains over there?

A. I believe not.

Q. Who told you where that roadbed was to be located according to that profile?

A. Where supposed to have been located?

Q. Yes, according to the profile; how did you know where and what part of this hill that roadbed

was supposed to have been located, as you now claim here.

A. I had no means of knowing where the road was supposed to be located.

Q. You understood the claim was made in this case that the road is not located at the place where the Rajotte-Fobert-Winters or Rajotte-Winters Company thought it was going to be located?

A. Yes, sir.

Q. In parts?

A. Yes, sir.

Q. I want to know where you got your idea as what part of this hillside it was supposed to be located. Of course, you could see where it was located. How did you know where they intended to locate it?

A. I didn't say I knew that.

Q. How do you know, then, how we could have moved it up or how we could move it down. Who told you about all that?

A. I was asked to illustrate a principle there, to make illustration.

Q. Why did you look over the roadbed? Couldn't you illustrate your principle without looking over the roadbed down there Tuesday?

A. I looked over the roadbed to learn the type of road that had been constructed and see if any waste banks along, any waste material.

Q. For all you know according to the preliminary plans that were made, that roadbed might have

been intended to run clear over here, and not on the hillside at all; is that correct?

A. Yes, some distance away.

Q. For all you know, might have been in Coos County instead of down in Tillamook County; that is, you have no way of knowing. That is a little exaggeration, but you have no way of knowing just what part of that terrain the railroad was to be made on, and all you have told the Court, all you intended to convey to the Court, is if you have a cut here, and if you intend to run a road here, and you throw it up the mountain side a certain thing happens?

A. Yes.

Q. That is all you mean to tell?

A. Yes.

Q. How do you know what you covered on this trip?

A. From Mr. Fobert's statements and consulting crossing, bridges, etc., over creeks.

Q. That is, Mr. Fobert told you, for instance, that you went up to Station 570?

A. Yes, sir.

Q. That is the way you knew?

A. Yes, sir.

Q. Now, Mr. Griswold,—
worked for, says in his complaint, that there was submitted to him a map and profile, what do you understand he meant was submitted to him?

A. A map and a profile.

Q. This is a profile isn't it?

A. Yes, sir.

Q. What would you understand by map?

A. A plan showing the horizontal arrangement of the line.

Q. That is how far up the hill it goes and how far down?

A. No, not at all. Showing its position relative to land lines such as corners, etc.

Q. That is, that would come nearer telling you where on this ground it was to run, that tells you more than the profile about that, doesn't it?

A. It would depend on the map. If it were a topographic map, it would; if it were not a topographic map, it would not. What is the purpose of the map, then?

A. They are made for various purposes; a right of way map is made to show—

Q. Not a right of way map.

A. That is one type of map we deal with; a topographic map is made for marking projections and locations.

Q. What is a location map?

A. A location map is usually a topographic map but not always.

Q. If the contractor said in his complaint that he was furnished with a map and profile you would understand then that he was furnished a map in addition to this profile, wouldn't you?

A. I would infer that way.

Q. That would be the way you would under-

stand it. Suppose the contract said that the engineer—the engineer of the employer—that is, of the Whitney Company in this case “assumes through this warning that the contractors have examined the ground over which the railroad is to be built and know that at the time he entered into this contract”—should be “they,” of course—“the amount of work to be done, the difficulties to be accomplished, the hardness of all material to be moved, handled and put in place, together with all other work to be done, and the quantities thereof to bring the railroad to a full and satisfactory completion by the time herein set forth for its completion. The contractors accept this work solely and unreservedly upon their own information, and without reference to any preliminary estimates of quantities, profiles, or other papers handed to bidders before the contract for doing this work is let, and the chief engineer reserves the right to alter and change the alignment, grades, forms and methods of construction as shown on the maps and profiles and he may increase or decrease any and all approximate quantities as shown on the preliminary estimate and the contractors hereby waive all claim to any anticipated profits, or damages owing to any such changes.” Now, first, I will ask you, with these words “shown on maps and profiles,” would you understand that something else had been submitted ther than this profile?

A. Yes.

Q. You would also understand that a person

entering into this contract would know that the alignment could be changed?

A. Yes.

Q. You would expect that it would be changed, that is, that it could?

A. That it might.

Q. You would expect that it might be changed by a provision like that?

A. Expect that it might be.

Q. You would be warned ahead of time that it might be changed by a provision like that?

A. Yes.

Q. You would be warned that the alignment might be changed, for instance?

A. Yes, sir.

Q. Knowing that roadbed is intended to be constructed somewhere along the hillside, you would know that a slight change in the alignment might work a great change in the quantity to be moved, wouldn't you?

A. Yes.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. You would also understand, Mr. Griswold, that would be the very reason that the contractor taking the work would consult with the engineer?

A. Yes, sir.

Q. Now, before you went down there, did you see a profile of this work?

A. Yes, sir.

Q. And what did you do with that profile?

A. I had a photograph.

Q. You had a photograph made of it?

A. Yes, sir.

Q. That is what you call a photostat?

A. Photostatic copy.

Q. Was that made in such a fashion that it would last a definite length of time?

A. It won't last very long.

Q. One other question I overlooked, did you pay particular attention to what is called waste material along this roadbed?

A. Yes.

Q. Where would you most likely find waste material?

A. Where would I most likely?

Q. Yes; where would it be, usually?

A. Well, it would be near the mouths of the cuts where it occurred, in all probability.

Q. And as you were going up the line, you made a particular examination to see whether or not there was any waste, didn't you?

A. Yes, sir, that was my purpose.

Q. Did you make any estimate of the amount of waste material that was along the line?

A. No, sir, there was very little waste material along that line.

Q. About how much would you say?

A. Maybe two hundred yards, maybe a thousand, possibly two thousand.

Q. Just tell the Court how many places you saw this?

A. Well, there is a small amount of material which may be waste, it is a spoil bank, at this graveyard cut they talk about. The reason I call it by that is that there is a coal bunker there, and there have been material taken from the foundation for this coal bunker, and I was informed that they made this bank, so I can't say this is true waste material, but there is a bank of material there that is not the bank of the railway, and what is called either spoil or waste. And there are several places along the line there where there are small amounts of material that waste from cuts, or may have been simply lost from the dipper of the steam shovel as it was loading the may have come from slides, or that may have been cars.

RECROSS EXAMINATION

Questions by MR. FREED:

Q. Mr. Griswold, on your inspection trip up there Tuesday, did you have any way of telling whether or not the contractors, the plaintiff in this case, excavated more material than was necessary?

A. Excavated more material than was necessary? Apparently not. Apparently they did not.

Q. I say, you mean to say from this inspection trip, you could tell whether or not they cut out forty feet in one place where they could have cut out twenty—just as a crude example?

A. Well, there was no more material excavated than is in those fills; evidently all the material excavated was required and apparently more was required, for some of these fills.

Q. You don't know whether or not more material was excavated than the cross section stakes required, do you?

A. Oh, no.

Q. You don't know anything about that. All you know is that here in 1923, October, 1923, looking at a roadbed that was built in 1919 and 1920, you didn't see what you term waste material lying around?

A. That is a fact, yes.

Witness excused.

MARK SWEENEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by MR. DOBSON:

Q. What is your business, what business are you engaged in?

A. In railway and highway construction.

Q. How long have you been engaged in that line of work?

A. Oh around about twenty years.

Q. And what class of construction, railroad work or logging railroad work?

A. Railroad work, logging roads and highways.

Q. In the state of Oregon?

A. Oregon, Washington; worked in British Columbia, Idaho.

Q. Have you had experience on what we call the west slope of the Pacific Coast here?

A. Yes, sir.

Q. That is in the region similar to work done here in Tillamook County?

A. Yes, sir.

Q. I will ask you whether or not, Mr. Sweeney, you had anything to do with the construction of this roadbed that is now in controversy here?

A. I was, in clearing right of way.

Q. With whom did you make your contract for that work?

A. Mr. Norris, Whitney people.

Q. Do you remember about when that contract was entered into?

A. It was around somewhere about the last week of January, 1920.

Q. Who was present, Mr. Sweeney, at the time you signed that contract?

A. Mr. Rajotte.

Q. Was that contract reduced to writing?

A. No, sir.

Q. Just verbal contract. Now, Mr. Sweeney, will you just tell the Court the conversation that took place between you and Mr. Rajotte—who was present for the Whitney Company?

A. Mr. Norris.

Q. Mr. Norris,—between you three?

A. Well, I couldn't remember the words, but we

were—I was trying to make a price with Mr. Norris. We finally agreed at \$260.00 an acre to clear the right of way from Kilches River to some station ahead.

Q. Up the line?

A. Yes, sir.

Q. Now, could you just for the purpose of getting this into the record, indicate the stations between which you took contract to do the clearing?

A. Yes.

Q. That was above the Kilches River, I understand?

A. Yes, sir.

Q. That is the Kilches River here. Kilches River is that Station 234?

A. Yes, I remember.

Q. What station was that?

A. About 276, if I remember right, is where I started. There was a little border down there we widened. I don't just remember where that was, but 276 was the first stake, I remember.

Q. Then how far did you go?

A. This was—

Q. I want to get the furthestest you went.

A. I went to 610, or somewhere around there, I don't exactly remember the station.

Q. Now, Mr. Sweeney, at the time you made this contract, had you been out upon this work, had you examined it?

A. Yes, sir.

Q. And beginning now at Station 276, had there been any clearing done at that point?

A. Yes, sir.

Q. And starting at Station 276, how far had this clearing been done at the right of way?

A. Up to about 370 or 375.

Q. 370 to 375?

A. Somewhere around.

Q. Now, this contract that you took then, as I understand, was for additional clearing? Is that a fact?

A. Well, the first part of it looked like additional clearing, but it was flat acreage.

Q. But was additional clearing?

A. The first part of it was really—

Q. What part of it? What part of that was flat? Just indicate on the profile about how much was flat.

A. I didn't get your question.

Q. Read as follows: "Now this contract that you took then, as I understand, was for additional clearing, is that a fact?"

A. No, it wasn't for additional clearing, what I would term, it was for the whole clearing.

Q. That is, your contract covered all the clearing?

A. Yes, sir.

Q. Now you said beginning at 270.

A. 276.

Q. Was that what you call flat clearing in there?

A. The reference I made to flat was to a flat price to cover the whole clearing.

Q. I see, a flat price for the entire clearing?

A. Yes.

Q. Now beginning at station 270, was that for additional clearing at that point?

A. Yes, sir.

Q. And you say was cleared as far as 375?

A. Yes.

Q. When you took this contract?

A. Yes, sir.

Q. Then from 270 to 375 was the additional clearing, was it not?

A. Yes, sir.

Q. Now, Mr. Sweeney, before we pass this conversation, what was said between you and Mr. Rajotte and Mr. Norris at that time with reference to the manner in which you were to be paid?

A. Mr. Norris asked Mr. Rajotte to carry my payroll, which was settled.

Q. That was settled at that time. Now after this contract had been made, about when did you start in on this work up there to do the clearing? About what date?

A. We worked five or six days in January.

Q. That is about the time you started. Where did you commence your operation?

A. 276, somewhere up there. I wouldn't be dead sure of the station.

Q. The clearing that you did there, just about how wide a strip did you clear, as you remember?

A. Well, at the first stake practically nothing.

Q. That was the beginning point?

A. Yes, and it run out and varied somewhere,

oh seven, eight, ten, fifteen feet. I haven't got data on just the distance.

Q. Before you undertook to do this clearing did they set stakes there to indicate where you would do the clearing?

A. I had stakes.

Q. Were there any other stakes set at that time, that you know of?

A. Well, yes, was location, and you see where the right of way was staked before, where I could tell how much farther I went out from the edge of that.

Q. Do you know what center line stakes are?

A. Yes.

Q. Were those changed?

A. I don't know.

Q. You don't know about that? But as I understand, what you call right of way stakes?

A. Yes.

Q. And then center stakes?

A. Yes.

Q. Now the stakes you know were changed were right of way stakes?

A. Yes, there were stakes set out farther than the other right of way.

Q. On this point I think the evidence shows, and I think it is understood that that roadbed was following along the side of the hills, the contour of the hills?

A. Yes, sir.

Q. On that additional clearing which you did, which way did that go?

A. On the first end it was on the upper inside.

Q. Yes, and as you got farther up it dropped to the other side, is that the situation?

A. Yes, it did, farther on.

Q. Now, beyond that point, beyond station 375, did you do any of what we term additional clearing, that is clearing where there had been clearing done before you went on the work?

A. Yes, I remember one instance in particular; between 505 or somewhere in there, about eleven stations in there; 505 to 515, I think. That is a considerable change.

Q. Considerable change at that point?

A. Yes.

Q. How do you know that?

A. Because there was some very heavy timber and lots of bushes.

Q. Now, Mr. Sweeney, referring back to station 276 and 375, what would be the cost of the clearing you did there, that additional clearing, as compared with the original or virgin clearing?

A. If you had asked the estimate on just the additional clearing, or would you want to apply to the whole clearing?

Q. Either way you want to apply it?

A. I would say about ten feet additional, owing to the way they had the clearing there. They didn't dispose of their brush and logs by burning, they were piled to the side, they were piled right on the edge of

the right of way, and I would say it cost at least two and a half times as much for ten feet than it would originally, because we had to remove the debris that was taken off the other part, take it away, besides clearing the natural growth on the extra ten feet.

Q. Was that the condition you encountered on these upper stations, say about 510?

A. Yes.

Q. That it required more time to do that work?

Q. Now did you continue on that work after the contractors were through up there?

A. No.

Q. You suspended operations when they suspended, is that a fact?

A. Yes, sir.

Q. I understand you to say that a request was made by Mr. Norris that the plaintiff in this case handle your account on the payroll?

A. Yes.

Q. Now was that done all through this work?

A. As far as I know, yes.

Q. Did you ever receive any remittance direct from the Whitney Company?

A. Yes, sir.

Q. And do you remember about what amount you received from the Whitney Company direct?

A. About.

Q. What was that?

?? A. There was a check for a thousand dollars, a thousand and two, I think, and some odd cents.

Q. Isn't it a fact it was \$1002.03?

A. It may be; very close.

Q. Did you ever have any conversation with Mr. Norris about that check?

A. Yes.

Q. When and where?

A. In his office at Idaville.

Q. What was the occasion of that conversation?

A. Well, as the check was mailed to me direct, and the fact that Rajotte, Fobert and Winters was carrying my payroll, I went to see Mr. Norris about it.

Q. What was said?

A. I asked him how about it, and he says, "That is yours."

Q. Did he say it applied upon your contract for clearing here?

A. No, sir. In the meantime I was putting in culvert for Mr. Norris.

Q. That was a separate contract?

A. Yes, sir.

Q. And was that the contract, or were you carrying on this culvert work during the time the plaintiff was engaged on this work too?

A. Yes, sir.

Q. Now with respect to your payroll for the culvert contract, who was carrying that payroll?

A. There was no distinction made.

Q. Was the plaintiff in this case carrying your payroll on this culvert work too?

A. Yes, sir.

Q. When did you make this contract with the Whitney Company for that culvert work?

A. Well, the latter part of May 1920.

Q. Did Mr. Rajotte represent the plaintiff in this case, did he know about that contract?

A. He was not present.

Q. He was not present at the time? Do you know who had the contract for constructing the culverts?

A. There was none before I started.

Q. Now when you took this contract did you have any conversation with Mr. Norris as to who was to carry the payroll for the culvert contract?

A. No.

Q. Did the \$1002.03 that you received direct from the Whitney Company—did that pay you in full for your culvert work?

A. No, it might have at that time, the estimate.

Q. What I want to bring out, did you receive any money from the plaintiff in this case during that construction work, which would apply on your contract for culvert work? That is, did any part of your pay for that culvert work come from the Rajotte-Winters Company? Or, put it another way: I understand you to say they carried your payroll?

A. Yes, sir.

Q. On the culvert work, as well as on the contract for clearing?

A. Yes, sir.

Q. So then at the end of each month when you

turned in the time of your men, you received that amount from the Rajotte-Winters Company??

A. Yes, sir.

Q. And that was on the culvert work as well as on the clearing work?

A. Yes, sir.

Q. Did you remind Mr. Norris of that fact when you had this conversation?

A. No.

Q. Mr. Sweeney, what was the main purpose of your seeing Mr. Norris at the time you discussed with him the fact that you received this check?

A. Well, I wanted to know how to trace it, what it meant.

Q. You wanted to determine whether to apply it on your culvert work or on your other?

A. Yes, sir.

Q. Is that the first time you ever went to Mr. Norris for the purpose of arriving at what was due you on each of your respective contracts?

A. The first time?

Q. Yes.

A. Yes, sir.

MR. FREED: We don't mind, if Your Honor wants to hear this, but I would like to know the relevancy of it.

MR. DOBSON: I should have explained there are two causes of action, and Mr. Sweeney will not be able to be here all the time.

MR. FREED: This is on the second cause? I didn't understand, that is all right.

Q. Mr. Sweeney, have you had a complete settlement with the plaintiff or the Whitney Company for your work down there on this clearing and grubbing contract, and on the culvert contract?

A. No, sir.

Q. Have you met Mr. Norris or any representative of the Whitney Company since you were through there, for the purpose of discussing final settlement?

A. I have met Mr. Norris, but I couldn't get—well, what I would call, a chance to thrash it out with him from the statements, and get together.

Q. Why not?

A. I don't know. I was here in the court room.

Q. Did you make an attempt to do this soon after you were through down there?

A. The first opportunity, yes sir.

Q. That was after the plaintiff in this case had suspended its operation?

A. Yes, sir.

Q. Did you go to the plaintiff in this case and attempt to secure a settlement?

A. I have got a statement from them—a statement.

Q. From them. And what does the statement show, if you know?

A. Shows that I was in the hole.

Q. Shows you were in the hole on the work?

A. On the work.

Q. Did Mr. Norris advance that as a reason at

any time you tried to make a settlement with the Whitney Company, for not settling with you?

A. Never heard a word, not anything.

Q. The matter stands just that way now?

A. Just that way.

CROSS EXAMINATION

Questions by MR. FREED:

Q. If Rajotte, Fobert, Winters, or Rajotte-Winters, was carrying you payroll, Mr. Norris would have no right to pay anything to you, would he? Do you understand what I mean? What right would you have to ask Mr. Norris to pay you anything if Rajotte, Fobert, Winters was carrying your payroll?

A. I didn't ask him.

Q. Then he doesn't owe you anything? I don't want to confuse you.

A. No, sir.

Q. But you say that Mr. Rajotte was to carry your payroll. That means that he was to—the payment was to be made to him—doesn't it? Is that what carrying the payroll means?

A. Not altogether. He was to pay my men, the men that were working for me.

Q. But who was the Whitney Company to pay for what work you did? Who did they pay? Who were they supposed to pay, you or Mr. Rajotte?

A. The way the matter stood, they were to pay Rajotte, Fobert & Winters.

Q. Then why should you try to get some money from Mr. Norris?

A. I didn't try to get any money from Mr. Norris.

Q. You were trying to make some kind of a settlement with him, you said.

A. I wanted to know sure how we stood.

Q. You wanted to check up?

A. Certainly.

Q. You wanted to check Mr. Rajotte, didn't you?

A. I wanted to check up how we stood on it, certainly.

Q. I am not criticizing you, I want to know what you were doing it for. You wanted to know whether Mr. Rajotte should pay you, or we were going to pay you, didn't you?

A. Well, certainly, we should get our estimates, yes. I couldn't settle with any of them without getting estimates from Mr. Norris.

Q. Mr. Rajotte paid all your men?

A. Yes, sir.

Q. If there was any surplus he was supposed to pay you, is that what is meant? I just want to understand what is meant by carrying the payroll.

A. We had no understanding on it, you see.

Q. What did you mean by carrying the payroll? What was he to do?

A. Carrying the men.

Q. Where was he to get the money, where was Rajotte to get money?

A. He was working for the Whitney Company, absolutely.

Q. The plaintiff. I have been speaking of Mr. Rajotte.

A. They were doing the work for the Whitney Lumber Company.

Q. The plaintiff was to pay your men?

A. Yes.

Q. And the Whitney Company was to pay the plaintiff, you say, for the work you did, is that right?

A. We understood reimbursed for the payroll, as far as we understood.

Q. How would you make any money out of that, where would you get any money?

A. Well, on the estimate, I would take the balance from Rajotte, Fobert & Winters account, and the balance would be due me on the estimate.

COURT: From whom?

A. From the Whitney Company.

COURT: You were working for the Whitney Company?

A. Sure. Mr. Rajotte, or, call it the plaintiff, was carrying my payroll for the work, because I didn't have the money myself. It was either up to the Whitney Company or Mr. Rajotte to carry my payroll.

COURT: (To Mr. Dobson) Was Mr. Sweeney your subcontractor?

MR. FREED: Yes, he was.

COURT: That is, your people owed him. He was working for the plaintiff, and not the Whitney Company?

MR. FREED: That is what I am trying to get the witness to say.

A. That is a point we never discussed. We had no written contract, you see. The fact of the matter is we had no business with Norris.

COURT: I understand the plaintiff was to clear the right of way as a part of their contract?

A. Yes.

Q. And they sublet that work to Mr. Sweeney?

MR. DOBSON: Just to make it clear, the contract says in substance this: That the contractor, the plaintiff in this case, may sublet a part of this contract, but the contract must really be made with the Whitney Company.

MR. FREED: It doesn't say so.

MR. DOBSON: Says so in substance.

COURT: Approved by them?

MR. FREED: Yes.

Q. Now in addition to the understanding you had about clearing, you spoke of a culvert building contract.

A. Yes, sir.

Q. You made that with the Whitney Company, that agreement to build a culvert?

A. Yes, sir.

Q. When you received the check for \$1002.03, do you remember what that voucher said? You know what a voucher is. Do you remember what was on that voucher?

A. Yes.

Q. What was it?

A. On the culvert.

Q. For culvert building?

A. Yes.

Q. Did you know anything about the payments that the Whitney Company made to Mr. Rajotte direct, the Rajotte-Winters Company, in regard to clearing and culvert building? You don't know about that, do you?

A. No, sir, not directly.

Q. You have no first hand knowledge of that?

A. No.

Q. Do you remember requesting in writing the Whitney Company to pay all due you to Rajotte-Winters Company?

A. Yes, sir.

Q. You did request them to do it?

A. Yes, sir.

Q. And that was after you had received this payment made to you direct?

A. Yes, sir.

Q. So it was not until after they had paid you this money direct that you requested them to make payments to Rajotte-Winters?

A. Yes, sir.

Q. Now how much was Mr. Rajotte getting for handling your payroll, or the Rajotte-Winters Company; what profit were they making out of you?

A. There never was anything said about it.

Q. Sir?

A. I don't know.

Q. What profit were they supposed to get?

A. Hasn't been anything said, never was, the question never came up.

Q. Did you understand that Mr. Rajotte was to carry, or the Rajotte-Winters Company, the plaintiff, was to carry your payroll and not make anything out of it?

A. We didn't discuss it.

Q. I know, sir, but what did you understand about it?

A. Usually they get a percentage.

Q. Usually?

A. Yes.

Q. Didn't you expect the plaintiff to get ten per cent profit, isn't that the usual profit?

A. Whatever was usual, I expected.

Q. It was a silent understanding. You knew that, but you never had any direct words about it. You have worked for Mr. Rajotte subcontracting, since then, haven't you, and before that? You have done other work under Rajotte-Winters, haven't you?

A. Before that.

Q. Had they ever carried your payroll?

A. Yes, sir.

Q. They charged you ten per cent for carrying it, didn't they?

A. No, sir.

Q. Why did you think they were going to do it this case?

A. It is usually the case.

Q. And you expected in this case to pay it?

A. They usually do.

Q. I say, you expected, in this case?

A. I didn't, I didn't know. There was no question said about it, but as a rule they usually do, contractors do; usually, but not always.

Q. Usually get a profit from the sub-contractor?

A. Yes, sir.

Q. Did you hear Mr. Norris ask Mr. Rajotte to carry your payroll?

A. Yes.

Q. When was that?

A. In the Lewis Building, here in Portland.

Q. You haven't any idea about the first of the year; before or after the first of January, 1920?

A. When we settled on the price.

Q. Well, sir, at what price did they agree to pay you for clearing the land? How much did they agree to pay you?

A. \$260 an acre.

Q. That was for just clearing?

A. Yes.

Q. No grubbing?

A. No.

Q. Who fixed that price?

A. Well, between us there we made out the price.

Q. Mr. Rajotte was in on that price fixing, wasn't he?

A. Well, he sanctioned the price

Q. He sanctioned the price.

A. Yes.

Q. He thought that was a fair price?

A. Yes.

Q. Then as I understood it, Mr. Sweeney, though this contract between the Whitney Company and Mr. Rajotte fixes the unit cost for clearing at \$180 an acre, Mr. Rajotte knew and sanctioned—knew that it was just and sanctioned that you should get \$260 an acre? That is right, isn't it?

A. Well, he didn't think it could be done at any less.

Q. In other words, Mr. Rajotte knew that the clearing couldn't be done at less than \$260 an acre?

A. At this time.

Q. What do you mean at this time?

A. When I took the contract.

Q. What has time got to do with it, tell the Court?

A. I don't know what he thought before.

Q. You mean at that time he thought?

A. Yes.

Q. I thought you meant clearing at this time. When was the contract made?

COURT: The 20th of January he said.

Q. The 20th of January Mr. Rajotte felt that the clearing was worth \$260 an acre, and that it couldn't be done for less, didn't he? That is your understanding, I mean?

A. Yes.

Q. Who brought you into the job? Did Mr.

Norris go get you, or did Mr. Rajotte suggest that you be employed to clear that land?

A. Mr. Rajotte, I believe, told me that there was——

Q. You were Mr. Rajotte's friend, in other words?

A. Well, I have been working for Mr. Rajotte.

Q. You never had worked for Mr. Norris before that, had you?

A. No.

Q. Well, did you know Mr. Hawkins, Russell Hawkins, president of the Whitney Company, before this time?

A. No.

Q. You never talked to him about going into the work?

A. No.

Q. All your conversation was with Mr. Norris? Did you do all the clearing that was done before the plaintiff's forces started to work there?

A. No, sir.

Q. Mr. Wood did some, didn't he?

A. I don't know.

Q. But somebody else did some?

A. Yes.

Q. Well, had you finished your work along the place where you cleared, before the plaintiff started working there? Do I make myself clear?

A. No.

Q. Had you finished clearing along the roadbed

before the plaintiff came up to do this work in that part?

A. I believe in most cases, I believe in most all.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Now Mr. Sweeney, I think the Court has the impression from your answers to Mr. Freed that you had nothing to do with determining the price you were to be paid for clearing this land up there, is that a fact?

A. No.

Q. Well didn't you go down and look at the work before you made a price?

A. Yes, I was down on the work.

Q. Now you said on direct examination that part of this work was flat contract basis. What did you mean by that?

A. That whole thing was on a price. When you asked me about extra clearing.

Q. I am talking now about the work that you referred to was on a flat basis. What did you mean by that?

A. A certain price per acre for everything.

Q. What was that price?

A. \$260.

Q. That included this additional clearing also?

A. Yes.

Q. Now the fact that you had this extra amount

of work to do in connection with this additional clearing, did it have anything to do with the increase in price?

A. Sure.

Q. Isn't that the real reason why you got \$260 an acre?

A. That is one reason why I asked.

Q. And even at that price you lost money on the work?

A. Yes, sir.

Q. Now, as a matter of fact, Mr. Sweeney, how much did Mr. Rajotte have to do with the price you got on that work? How much did Mr. Rajotte have to do in fixing the price you were to get for that clearing?

A. I went down—I don't know that he was—that he had much to do with it.

Q. Did he suggest the \$260 an acre himself?

A. I would have to give you a little more explanation in your answer, something else came up before.

Q. All right, go on.

A. I had already before given Mr. Norris a price of \$320 an acre, first, when I went down and examined the work.

Q. That is, before you talked to Mr. Rajotte about it?

A. Yes. Then when I came back to Portland, as I remember, Mr. Norris wrote me a note telling me it was too much, and he would like to get together and see if I could be a little easier on it. In the mean-

time I came to talk to Mr. Rajotte, and in that way we discussed it, you see, in order to bring me down to the figures, and in that way we agreed.

Q. It was Rajotte's idea to get you to do the work for less, was it not?

A. Yes sir.

Q. Did Mr. Rajotte have anything to do with your fixing the price of \$320 an acre that you first made to Mr. Norris?

A. No.

Q. Did he know at the time you submitted that price, that you had submitted any such price?

A. No.

Q. Did you know Mr. Wood, the gentleman Mr. Dreed referred to?

A. No.

Q. Now as I understand, you didn't do all of the clearing of that right of way?

A. No, sir.

Q. All that part, we will say back of 276, that was all cleared, was it, before you went up on the work?

A. Yes, sir.

Q. And just the parts that you have mentioned, is the only clearing you had to do?

A. Yes, sir.

RECROSS EXAMINATION

Questions by MR. FREED:

Q. How much did Mr. Rajotte think you ought to get for that clearing?

A. Well, I don't remember where the discussion came to.

Q. You remember what Mr. Norris told you, you ought to remember what Mr. Rajotte told you. You say Mr. Rajotte wanted to do it—or Mr. Norris, I mean, wanted you to do it for less than \$320, you said?

A. Yes, sir.

Q. Then you spoke to Mr. Rajotte, and the final conclusion was \$260. I would like to know what price Mr. Rajotte thought was fair?

A. \$250, as I remember.

Q. Mr. Rajotte thought \$250 was fair?

A. As I remember, I think he said \$250.

Q. But he thought \$250 was about as cheap as the clearing could be done for?

A. At this time.

Q. At this time, I understand, in January, 1920?

A. Yes. You see, the way it was fixed—

Q. Just to get this clear. You spoke of having talked to Mr. Norris before talking to Mr. Rajotte. You said that in answer to counsel's question. You don't mean you talked to Mr. Norris about clearing before you even talked to Mr. Rajotte about clearing, do you?

A. No, no, but it was in Portland, before we met Mr. Rajotte, about the price.

Q. The first proposition about the clearing came from Mr. Rajotte?

A. I believe so.

Q. Now you had not done any clearing before that time, before January, 1920, is what I am to understand?

A. On that work.

Q. Along the roadbed, I don't care what part.

A. No clearing on right of way?

Q. On this road.

A. Oh, no, no.

Q. You had done none before that? That is the first clearing?

A. That is the first work I done on the road.

Q. Explain to the court then, if you will, why clearing would be more expensive at that time than at any other time.

A. What I mean by it, your Honor, was they had already cleared sixty foot right of way, it might be about a mile, or a mile and a half. Then there were stakes projected out about ten feet, or eight feet, or four feet, or one foot, all along the edges. I claim that that ten feet, or five feet, whatever it is, would cost two, three or four times as much as would naturally in the original state, that increased your cost.

Q. It would cost four times as much?

A. Some instances would.

Q. Then you think that a fair price to clear a solid mass of trees would be \$60 an acre?

A. No. As compared to the smaller percentage of this, compared to the whole.

Q. What is a fair price for the clearing in the original instance?

A. With heavy clearing, right now, about \$300 right now, or four or five, right now.

Q. Then I understand you to say—I don't believe you understood me—you now say it cost more to clear a solid mass of trees—I believe you call it virgin clearing—than it would to clear along the edges, didn't you?

A. No. You asked me the price now, of clearing.

Q. I don't mean today. I am not referring to today. I am talking about what would have been a fair price at the time you made that agreement, to have cleared the land if you could have gone in and cleared a solid mass, virgin clearing, I believe you call it.

A. It could be done a little cheaper.

Q. How much cheaper? How much would you have been willing to do it for?

A. Not much less than what I worked right there.

Q. Well, was just about the same when it comes down to it?

B. But that covered my increased cost. Of course I bid too cheap on that, because I was jewed down on it.

Q. In other words, really at that time a man couldn't clear what you were proposing to clear, for \$260 an acre, and come out on it?

A. Well, a man could just about break even.

Q. Then what would you say it would cost—a fair price, to have cleared solid clearing? I just want to get a statement from you.

A. What you would want to get, how much the increase—

COURT: No, no. Suppose that right of way had not been cleared at all.

A. I understand.

COURT: What would have been a fair price to have gone in there and cleared it?

A. Right through now, where that extra clearing was, that was light there. You have got to see the ground and the different growths of timber. Right there, where that extra clearing was, was light there, it was lighter than the timber ahead. You have to figure on that, and see what it looks like.

COURT: Take the entire tract.

A. It would lessen the cost. It would lessen the cost about—well on the whole—the real cost I know it would increase the cost about \$50 an acre.

Q. Then you would say the real cost, the actual cost of doing that work would have been about \$210 an acre?

A. Yes.

Q. That is what you mean to tell?

A. Would increase it.

Q. You mean then, that about \$210 an acre would be the cost of clearing if there had been no previous clearing?

A. Yes.

Q. Now, didn't you do some virgin clearing?

A. Yes.

Q. And you got \$260 an acre for doing the virgin clearing?

A. Yes.

Q. Were you paid too much?

A. No.

Q. Then wouldn't \$210 be too little?

A. Well, the only way you could do that would be to classify the clearing, the only way you could get at it. I would not take the contract on an average price for the whole thing. You see you would have to classify the clearing in order to see whether I got too much for the virgin clearing, or for the other.

Q. Then when you said \$210 an acre—I understand what you mean on the other proposition when you said \$210 an acre would be fair—you meant as an average, didn't you? You meant \$210 right on through? You didn't mean to take any particular part and say \$210 was fair?

A. No.

Q. You meant an average?

A. Yes.

REDIRECT EXAMINATION

Mr. Freed asked you if you had made an agreement or were paying the plaintiff in this case any percentage for carrying your payroll?

A. Yes.

Q. You didn't have any contract with the plaintiff to carry your payroll, did you, whereby you were to pay them a percentage?

A. No.

Q. You didn't want the Court to understand that, did you?

A. No, no, was never a question, because the fact of the matter is I never pay them personally. He has been carrying my payroll for years.

Q. Now, Mr. Sweeney, I think the point the Court wants to know, and Mr. Freed was trying to develop here, you cleared all told about how many miles of this nine mile or twelve mile railway?

A. Must have been about five or six miles. the other part of it?

Q. You had nothing to do with the contract for

A. No.

Q. Suppose you had been called in to make a price for clearing that right of way as a whole. Could you now tell the Court what price you could have made?

A. Yes.

Q. Hand you seen it before it was cleared?

A. Well, no; I didn't see all of it before it was cleared.

Q. Then how could you tell the Court now what average price you could clear the entire right of way for?

A. I base it upon the price it would cost me on an average, right through, that is the only way we would contract.

Q. As I understand, when you went upon this contract the right of way had been cleared up to about the point where you started?

A. Yes, sir.

Q. And all that part back towards the S. P. tracks had already been cleared?

A. Yes, sir.

Q. Now, you don't know anything about the extent of the clearing done there, do you?

A. No, I didn't pay much attention.

Q. For all you know it might have been cleared for \$100 an acre?

A. I don't know.

Witness excused.

DAVE KRAFT—A witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Mr. Kraft, what is your occupation or business?

A. At the present time?

Q. Yes.

A. Right now I am occupied with Rajotte-Winters.

Q. How long have you been in their employ?

A. About eleven months.

Q. I will ask you whether or not you were in their employ during the time they were engaged in the construction of this roadbed for the defendant, the one we have been talking about in this case?

A. I was not.

Q. I will ask you whether or not you were employed by anyone and engaged in some capacity connected with the building of that roadbed at that time?

A. I was employed by the Whitney people.

Q. At that time. When were you first employed by the Whitney people?

A. 1916.

Q. Without going into too much detail, just tell the Court briefly what you were doing at that time.

A. Why, I was working in the engineering department, chain man.

Q. And as chain man just what were your duties?

A. To measure out the center line for this railroad.

Q. State whether or not at about that time you measured out the center line for this railroad that is now under discussion?

A. Not all of it.

Q. About how far?

A. Well, probably about seven miles of it.

Q. Seven miles? Can you take the profile and

just indicate about where that would be, mentioning the station numbers? You can refer to the switch, or something you know about.

A. I might have misunderstood your question.

Q. That would be about what point?

A. Very few hundred feet above Downs Creek.

Q. That is station 380. Now at that time who was chief engineer of the road, or do you know?

A. Mr. Cole.

Q. Now did he accompany you at this time, that is, the crew you were with?

A. Yes, sir.

Q. Was he with you usually when you were making this survey?

A. He was.

Q. And I will ask you this. At that time did you set what is called center stakes?

A. We did on our location, yes.

Q. Now was that the extent of the work you did there in 1916?

A. No, sir; we located up Downs Creek.

Q. Now, Mr. Kraft, does that take you away from the line of this roadbed?

A. Yes, sir.

Q. That would have nothing to do with this?

A. It does beyond Downs Creek, that is, the mouth of Downs Creek.

Q. When were you next employed by the Whitney Company?

A. 1917.

Q. In what capacity were you employed at that time, and what did you do?

A. Same capacity, and doing the same line of work, except we didn't do any location.

Q. What do you mean by not doing location?

A. We ran preliminary lines.

Q. What does that mean?

A. Well, I don't know whether I can make it clear or not. All I can tell you, we ran a line, more or less.

Q. That was from what point?

A. That was from——

Q. From Sam Down's Creek?

A. No, beyond Sam Down's Creek. We ran preliminary lines up Kilches River, but I can't tell just to what point, and we took up this point the next year and continued on.

Q. What I am referring to, is this line, these surveys that were being made, they were about to build this particular roadbed. I am not interested in any line you ran that would diverge from those. So you started in 1917 about Sam Down's Creek?

A. No, we started beyond there, I should judge probably—well, I don't know for sure—maybe three or four miles, something to that effect.

Q. How far did you go with the survey of preliminary location?

A. We continued that line probably four miles farther.

Q. That would take you about up to what point?

A. That would take us up a short way beyond what we call Little South Fork.

Q. Can you find on the profile a station number?

A. No, it doesn't show on the map.

Q. South Fork River doesn't show on this profile?

A. I couldn't tell you what station.

Q. For the purpose of refreshing your memory, were you on this work at the time the plaintiff, that is the Rajotte-Winters Company, were constructing?

A. Yes, sir.

Q. Were you there at the time they ceased operation?

A. Yes, sir.

Q. Now bearing that fact in mind, there is a point to which you established your survey in 1917, the one you were talking about. Was it beyond that point?

A. Oh, yes, our preliminary survey was beyond that point.

Q. In other words, that is the point you mean, the South Fork?

A. The Little South Fork.

Q. Was beyond the point where the plaintiff in this case ceased operation. Now did you set any stakes in connection with this survey indicating any lines, in 1917?

A. Not on location, no sir.

Q. No stakes were set at all?

A. No.

Q. Now did you make any further surveys at any other time, or were they working on survey crews at any other time subsequent to 1917?

A. Not at any other time, no, except 1919.

Q. Now 1919 what did you do?

A. Worked in the same capacity for the Whitney people.

Q. And about what time did you enter their employ?

A. Some time in March.

Q. In March, 1919, and you were running a chain, or working on the chain, as you call it?

A. Yes, sir.

Q. What were you doing?

A. Well, at that time when I first went down in there, we did a little cross section, setting out cross section stakes and right of way stakes.

Q. Just at what point did you begin setting out right of way stakes and cross section stakes, as near as you remember?

A. About station 6 or 7, that is west of the Southern Pacific track.

Q. When you set out cross section stakes, that indicated the point at which the contractor here was to make a fill, is that it?

A. No, that was to establish the right of way.

Q. For cross section?

A. I was speaking of right of way stakes.

Q. You set out right of way stakes first?

A. Yes, sir.

COURT: You say you set out cross section stakes at 6 or 7 in March, 1919?

A. No, that was right of way stakes.

Q. That is indicating the width of right of way?

A. Yes, sir.

Q. How far did you go with that operation?

A. As far as Sam Down's Creek.

COURT: Down's Creek is about station 378?

MR. DOBSON: That is station 380.

Q. Now did you set any other stakes there?

A. We did.

Q. Between what points?

A. We set some cross section stakes.

Q. Where did you first set cross section stakes?

A. We set some down close to the Bay, wherever we could before the contractors got in there.

COURT: When was that?

A. Spring of 1919.

Q. In setting these right of way stakes, this first operation, were there any other right of way stakes there at that time?

A. No, sir.

Q. Was there center line stakes there at that time?

A. Yes, sir.

Q. That was up as far as Down's Creek?

A. Up as far as Down's Creek.

Q. Referring back to the cross section stakes, how far did you set those, to about what point?

A. Well, we set them wherever we could, from station 8, I think, back to whatever the station at the

Bay. I have forgotten now. Station about 17 or 18, I think.

Q. From station 6 to station 17?

A. That is west of the S. P. track.

Q. Then you didn't go across the track with those?

A. Not there, but we did beyond the County Road, that would be about station 30, I think, somewhere in there, I think.

Q. It starts with a hundred west of the track?

A. It would be about—well, I should say along about 130, up to about probably 150 or 151, somewhere in there.

Q. That would be about up to what we refer to as Cemetery Cut?

A. Yes, sir.

Q. Set the stakes up to that point. Now subsequent thereto did you proceed with this stake setting operation, cross section stakes, beyond that point?

A. No, sir, not at that time.

Q. Do you remember having to discontinue setting out cross section stakes from station about 151 to four, along up the line?

A. No, I couldn't be sure. Sometime after the contractors were in there, though, and had the right of way clear.

Q. The main fact I want is, did you go beyond that with your cross section stakes?

A. We did.

Q. About how far?

A. As far as the end of the line, that is as far

—well we were beyond where the contractor finished, but how far I couldn't tell you.

Q. With your cross section stakes?

A. The cross section stakes.

Q. Did you continue with that from day to day ahead of the contractors?

A. Not always, we were not always setting those out, we had other work we had to do.

Q. But during the time you were in their employ you set cross section stakes for practically all the line which was constructed or built by the contractors in this case?

A. Yes.

Q. I want to ask you this: After having set these cross section stakes, did you ever go back and change it?

A. Well, we did in a few instances, yes.

Q. Do you remember any particular instance in which you did?

A. Yes, we did; I should think, about station 106 on up to 124.

Q. 124. You re-set the stakes in between those stations?

A. Yes, sir.

Q. Do you recall any other place where you re-set these cross section stakes?

A. No, I can't; not right at the present time.

Q. Well, as a matter of fact, do you know whether or not you did change any cross section stakes beyond that?

A. Yes, we did; at different places.

Q. But you can't at this time fix the points?

A. No, sir.

Q. Well, we will say, referring to that part of the right of way beyond the Kilches River, between that and Sam Down's Creek, or Clear Creek; just look at the profile and see if you can look at that and refresh your memory. Here is Clear Creek. That is at station 330. Kilches River is station about 234 or 5; between those points, between those two streams?

A. I couldn't tell you for sure now, where.

Q. Do you know that you did set any stakes between those stations?

A. Yes, I set stakes.

Q. I mean, did you re-set cross section stakes?

A. I think we did on a few occasions, not very often, but occasionally.

Q. But you wouldn't be able to indicate just where they were?

A. No, I would not, just now.

Q. You weren't particularly interested at that time?

A. Of course we had so much other work to do we naturally forgot about that at the time.

Q. Now going beyond Sam Down's Creek, just examine the profile as you go along—between that and Sam Down's Creek, that includes stations 330 and 380, there are two bridges in there, and apparently a cut; beginning to get rugged. Does that refresh your memory as to whether you had to re-set cross section stakes in there any where?

A. No, I don't.

Q. You can't recall?

A. I can't recall.

Q. You don't know whether you did or not?

A. I don't.

Q. Going beyond that point—

COURT: That is as far as the road was located at the time the contract was entered into.

MR. DOBSON: He said he set stakes clear along through.

COURT: I know, but that was located after the contract was entered into. Keep that clear.

A. I think we made some changes along about 460.

Q. And what was the extent of those changes, that is, running distance?

A. When we first cross sectioned that they figured it was too much yardage.

COURT: You changed in order to reduce the yardage?

A. Yes, sir.

Q. That change was made—just came as an order, and you helped carry it out?

A. Yes, sir.

Q. You didn't have any conference with the engineer, Mr. Norris?

A. I did not.

Q. Or Mr. Cole, about it?

A. No, sir.

Q. Now, Mr. Kraft, you understand the various marks on the profile?

A. Most of them, yes.

Q. Any markings on that profile indicating curves?

A. Yes.

Q. For the purpose of refreshing your memory, do you remember of making any changes in these stakes for the purpose of correcting curves?

A. Not cross section stakes, no sir.

Q. Did you change any stakes for that purpose?

A. Yes, sir, we changed our center line stakes.

Q. You changed your center line stakes?

A. Yes.

Q. Did you change any other stakes?

A. Not very apt to, no sir, not at every change, anyway.

Q. For the purpose of refreshing your memory, go back to station 260, and I will ask you whether or not you can state whether the right of way stakes were changed to that point?

A. No, I think the right of way stakes were changed probably beyond there, maybe around about 273 or 4.

Q. To what extent were they changed?

A. Well, they weren't changed a great deal. We changed our center line about 270.

Q. How far would you carry it?

A. We carried most of that change at this time up to Clear Creek, that would probably be at station about 3—well, probably about 320.

Q. And do you recall now of any other changes?

A. Yes, we changed the line over across the Clear Creek bridge.

Q. At about what station?

A. Well, I think we started in there about station 338 and continued on as far as I can remember, to about 344.

Q. Now if there are any others, Mr. Kraft, you just go ahead and state. I don't want to take up too much time on these. I want to give the Court the benefit of any changes you might have made, or rather, information as to any changes you might have made.

A. We made another change around about 510.

Q. What was the extent of that change?

A. I should judge about 800 feet.

Q. When you refer to this change there, and the one mentioned just before this, you mean by that you had once set stakes, and thereafter went in and changed them?

A. Yes, sir.

Q. And were they center stakes or cross section stakes you are referring to?

A. Those were center line stakes.

Q. That meant you were changing the center line of the roadbed?

A. Yes, sir.

Q. And the reason for these changes you don't, of course, know?

A. Well, I always thought probably it was for better alignment.

Q. You had nothing to do with making decisions where the line was to go?

A. No, sir.

Q. You were just one man with the survey crew?

A. Yes, sir.

CROSS EXAMINATION

Questions by MR. FREED:

Q. Mr. Kraft, you said that you were now in the employment of the plaintiff in this case?

A. Yes, sir.

Q. Now you told us about the change that was made in the cross section stakes between stations 106 and 124.

A. As near as I remember.

Q. In general that is right?

A. Yes, sir.

Q. Did you hear the testimony in court yesterday?

A. No, I was not here yesterday.

Q. You came today?

A. No, I was here the day before, but yesterday I was not here.

Q. Did you hear the testimony in court in regard to the plaintiff in this case going back and raising the grade?

A. Yes.

Q. Along between 106 and 124?

A. Yes.

Q. That is where the rails were under water, that is where you are referring to, isn't it?

A. Yes, sir.

Q. And that is the same change?

A. That is the same one.

Q. And that is the change where you came back and raised the grade in order to keep the roadbed and rails above water?

A. Yes, sir.

Q. And you don't want the Court to understand, do you, that any other change was made at that point than that change?

A. Well, as far as I know myself, or can remember.

Q. What I mean to say, this change you are talking about—

A. That is the change I am talking about.

Q. We have had that told before, and I want to clear that up in the Court's mind. How much work had been done on that roadbed between 106 and 124 before you came back and changed it? I know the rails were on there, but how much work had been done to build the roadbed there?

A. To build the roadbed. Well, I couldn't say for sure, but I thought it was along to about 106.

No, you don't understand. Was there a perfectly good roadbed there with track on it?

A. No, sir.

Q. Tell the Court what kind of a roadbed that was you went back and did that.

A. The roadbed in fact was a swamp, almost right through there, at that time.

Q. Did they have much roadbed built?

A. Not right in there, no sir.

Q. I am talking about 106 to 124.

A. Not right in there, no sir.

Q. Would you say then that roadbed had been completed at that point?

A. Now I am not sure whether they completed that according to Mr. Cole's ideas or not.

Q. What did it look like? Did it look like—

A. No, not to me.

Q. If you were an engineer there, would you say that was completed?

A. No, I would not.

Q. Now, you spoke of changes in the stakes. Sometimes you don't designate whether it was center line stakes or cross section stakes, and I won't go back over all that, to correct it, but I want to ask you this: Around at station, say 270, along in there, you said a change was made in the stakes. That was all cross section stakes, wasn't it?

A. That was not. That was all center line that was changed.

Q. Had the plaintiff in this case done their grading?

A. No, sir; not at that point.

Q. In other words, you made the change before they got in there to work?

A. We did.

Witness excused.

VERNE W. WINTERS—A witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by MR. DOBSON:

Mr. Winters, were you one of the stockholders and officers of the Rajotte-Winters Company, plaintiffs in this case?

A. I am.

Q. And how long have you been connected with them?

A. Since its organization in 1914. Was first a co-partnership and then a corporation.

Q. And that corporation was engaged in the general contracting business during all the time since its organization?

A. It has been.

Q. What work were you engaged in, or business, prior to the organization of this corporation?

A. Contracting.

Q. Same line of work?

A. Yes.

Q. And you have been engaged in the building of railroads, or work of similar nature, as the one under discussion here.

A. I have.

Q. About how many years?

A. About 15 years.

Q. Did you have anything to do with making the contract in this case—that is involved in this case?

A. I think I seen the contract, but I don't think I had anything to do with making it.

Q. You had nothing to do with the preliminary

negotiations leading up to the making of the contract?

A. Not very much.

Q. I will ask you whether or not you ever saw this work prior to making the contract?

A. No, I never saw it.

Q. All the information you had about the work was it came from some one else, that is before making the contract?

A. Yes, before making the contract.

Q. Were you ever upon this work during the time it was under way?

A. I was on it several times. I can't recall the exact time.

Q. Any particular reason for your going there on these occasions?

A. Once I think I went down to go fishing, and the other time I went down to look at the work; I think right after we took it or shortly after we took it I went down.

Q. It wasn't ever necessary for any reason you should go there to discuss some question?

A. No, I never had anything to do with the handling of the work at all.

Q. You had nothing to do with the management of the work under progress?

A. No, nothing at all.

Q. Mr. Winters, I want to ask you whether or not you have examined the final estimate as given to your company by the Whitney Company at the close of this work?

A. I have.

Q. And I will ask you whether or not you have examined the profile?

A. I have.

Q. Plaintiff's Exhibit I in this case. I will ask you whether or not you have taken off that profile the quantities as there indicated for the twelve miles?

A. Taken off the quantities shown on the profile, and added them up, and gotten the totals.

Q. You can show the totals, mile by mile?

A. You said twelve miles; I have taken for the twelve miles, taken at the time the steam shovel stopped working.

Q. That is as far as you completed the work?

A. Yes, sir.

Q. Now, Mr. Winters, I will ask you whether or not you have compared the quantity shown on the profile, as far as this work was completed, with the estimated quantities, as incorporated in the contract?

A. Yes, I have.

MR. DOBSON: At this time, Mr. Freed, if you have no objection, I would like to introduce this final estimate.

MR. FREED: I have no objection to final estimate at all. This was what was furnished you by the Whitney Company?

A. Yes.

Q. (Mr. Freed.) Now, what is this supposed to be?

MR. DOBSON: At the conclusion of the work

you furnished us the final estimate of the quantities moved by us.

MR. FREED: I have no objection subject to my checking these with the copies we have.

Marked "PLAINTIFF'S EXHIBIT 3."

Q. Now, Mr. Winters, I will hand you Plaintiff's Exhibit 3, which is the final estimate furnished to your company by the Whitney Company at the conclusion of this work, and I will ask you to state whether or not you took this final estimate and made a comparative statement.

A. Yes, I took the figures, I used in my comparative statement off this final estimate.

Q. Have you that comparative statement with you?

A. Yes.

Q. Is this a duplicate?

A. This is a duplicate of this.

Q. Now, as I understand, Mr. Winters, you can show the various quantities of the various kinds of materials moved for each mile as far as you completed it?

A. Yes.

Q. And also the totals?

A. Yes.

Q. For the purpose of getting that into the record, I wish you would just state what that shows—that comparative statement shows?

A. I would like to explain how I obtained the figures, as shown by the profile.

Q. Yes, you can show that.

A. On the profile they have marked mostly above the line "borrow" and cuts were represented by the quantities that are supposed to be excavated in that mile, and I have simply gone down the profile and taken each mile, and added up those figures that are shown on the profile as the total quantities in that mile. That is the way we generally arrive at quantities in any particular mile of work. Generally, when we furnish a profile, there is a summary on each mile. That is, the engineer makes what he calls a recap on each mile; that shows the quantities. They didn't do it on this profile, but you can get it by going along and taking.

Q. Did that indicate any other work you were to do?

A. These brackets here, marked "fill" supposed to represent the quantities of earth put in the fill. These arrows here are supposed to represent overhaul.

Q. Better explain that fully.

A. For instance, take this fill here. There is a line there and a line there, and this dotted line with arrow on, this borrow, 10,320—that is 10,320 yards of earth or material of some kind, whatever it is, is to be taken from the ground some place between these two lines and put in that embankment; 6,100 yards in that fill over there. That means six thousand yards of that goes into that fill. There is a little fill here marked 2,980 between these two brackets. That would mean that fill is put in right parallel to that

line, but in a different track. That really represents the material that goes in that Y, as I understand. Above up here is another bracket that has a fill, 1240. I would interpret by looking at this line that means that amount of yardage is to be put in in that interchange track. If you add up those quantities, you will find that this 1240 and 6100 and 2980 all added together make up the 10,320 that is supposed to be borrowed, and the fact that these arrows are at the end of that line would indicate that that material is all to be obtained between those two limits. Generally put on the profile to enable the contractor when he looks at it to get some kind of an idea where the engineer intends the material is to be taken from.

Q. And also to indicate the amount of overhaul that would be on the entire contract.

A. That amounts to the same thing.

Q. Just go ahead with the statement with respect to result.

A. You want me to go through mile by mile, or total?

A. No, don't do that.

COURT: Give the total.

A. Total yardage moved?

COURT: Give me excavation.

A. Common excavation—I am giving first the estimate, what was moved on the estimate; that is, 183,381.4.

COURT: As shown by the profile?

A. No, this is giving the final estimate, the Whitney Company's estimate.

COURT: That is common?

A. That is common excavation. 1587 yards that is loose rock; 7806 solid rock; total is 192,774.4 yards. That is the total of those three. No, in adding up the profile yardage I only went to Station 546, as I understand that is where the shovel stopped its operation. I simply took this quantity off the profile to Station 546, and then added them together. They are not classified on the profile. The profile just shows yardage. Does not show material—does not show kind of material. And the result obtained by that is 128,174.

COURT: That includes common, solid rock, and loose rock?

A. Yes, everything. The total increase, as I figure it, is 64,600.4. That would be about 50 per cent increase. Now, I took the overhaul, and I went through the profile and added up all the overhaul I could find. That totaled 166,987 yards.

COURT: That is from the profile?

A. That is from the profile, yes, and actually given us in the estimate was 680, 229, or an increase of 300 per cent in the overhaul quantity. You understand I only took those quantities on the profile to Station 546.

Q. Now, those figures, they only cover the work for the miles you covered?

A. Yes, that is the idea.

Q. Now, Mr. Winters, did you ever have any conversation subsequent to the time you discontinued

work upon this roadbed, with Mr. Norris, or Mr. Hawkins, or any other official of the Whitney Company?

A. I had lots of conversations with them, but I can't remember exactly what they were.

Q. Do you ever remember having a conversation with them where you discussed this work or any of its phases?

A. I don't think I ever discussed this work with any representative of the company that I know of.

Q. What I want to bring out is this: Do you know Mr. Hawkins?

A. Yes, I know Mr. Hawkins.

Q. Did you meet him after this work had been completed as far as you went with it?

A. You mean after we finished the contract and left there?

Q. The records show you were ordered to move off the work there sometime in September, I think September 25, 1920?

A. I think I went in his office with Mr. Rajotte once or twice.

Q. Would you say that that was after that date, that is to say, after you had stopped your operations?

A. I remember going around to his office twice with Mr. Rajotte, but I couldn't get to see him.

Q. What was your purpose, or what was the idea in seeing Mr. Hawkins at that time?

A. Final settlement on the work.

Q. As a matter of fact it was after you had discontinued your work up there?

A. Yes, at that time.

Q. Did you ever see Mr. Hawkins at any of those times you attempted to see him to get a final settlement on the work?

A. Might have seen him once, but I don't remember of ever having seen him.

Q. Don't you remember of ever talking with him?

A. No. You understand I was running another job at this time, and I didn't pay very much attention to this work. Mr. Rajotte handled it here in Portland. Mr. Rajotte lived in Portland, and Mr. Hawkins had an office in Portland, and Mr. Rajotte handled him. But I remember going with Mr. Rajotte to Mr. Hawkins' office a number of times when I was up here, but never do I remember getting to see him.

Q. Did you ever see him anywhere else?

A. Sure, I saw him during this work, yes.

Q. That isn't the time I refer to. I thought you had seen him and talked to him some time subsequent to the 25th of September, the date that you stopped operations up there.

A. No, I can't remember seeing him since that.

Q. Did you ever talk to Mr. Norris?

A. Yes, I talked to Mr. Norris lots of times on the work.

Q. Did you talk to him since?

A. No, I don't remember.

Q. Pardon me for asking the question, but I understood you had.

A. No.

CROSS EXAMINATION

Questions by MR. FREED:

Q. Either on the profile quantities or on the actual quantities you said you went up to Station 546. Which was that?

A. I said in taking the quantity on the profile I went to Station 546.

Q. In other words, you went to 546 on the profile?

A. Yes, sir.

Q. That is what I wanted to get straight. Now, Mr. Winters, where did your company get a copy of this information you have put in evidence as Plaintiff's Exhibit 3? Where did your company get that so I can have it identified?

A. Why, was given us by the Whitney Company. What man in the Whitney company gave it to us, I don't know. I presume Mr. Norris.

Q. Would your records show whether a letter accompanied that, or anything of that kind. Do you know whether it was mailed to you?

A. If it was mailed to us in Portland, our records wouldn't show it. If mailed to Spokane, our records would show it.

Q. Don't you keep records of the mails sent to Portland?

A. The records here not kept as complete as at Spokane.

Q. If I sent you a check to Portland, with voucher accompanying it, wouldn't you have a record of that even though it was sent to you at Portland?

A. Probably be mailed to Spokane, if anything of importance.

Q. Would you call that of importance?

A. Yes, but a letter might not be mailed at that time. The mail might be opened here, and his taken out and mailed to Spokane, but the letter accompanying it might not be mailed to Spokane.

Q. Then you don't know from whom you got that?

A. No, sir.

Q. Must have been from the Whitney Company?

A. Must have been from the Whitney Company.

Q. But you don't know. That is just a conclusion you reach, it must have come from them because you wouldn't have it otherwise?

A. We have no way of obtaining ourselves. No, we never measure the work, put an engineer on.

Q. As far as you know, you have no record of receiving that. The only fact is you had it?

A. That is the idea, yes.

Q. You have that paper?

A. We have that paper.

Q. And you draw the conclusion that came from—

A. The Whitney Company.

Q. And that they furnished you, in other words, with an estimate?

A. That is my conclusion.

Q. You have no letter accompanying it or any explanation of any kind?

A. Mr. Rajotte may have a letter. I haven't talked that over with him. As far as I am personally concerned, I have no letter.

Q. I am talking about your company.

A. I don't know what the company has got in regard to it. May have a dozen letters.

Q. I will have to ask you to find out and tell us. You are an officer of the company. I would like to know if any letter accompanied that?

A. I can't answer.

Q. Is there anything on there to identify that as coming from our office?

A. Typewritten notation at the top "Quantities, The Whitney Company Railroad from Kilches Point to Station 576, Contract prices, actual quantities handled."

COURT: Is that signed by anybody?

A. Is not signed at all.

Q. You don't know any more about it?

A. No, I don't.

MR. DOBSON: Is it your contention it is not a correct statement of the estimate?

MR. FREED: No, I haven't made any contention yet. I will have some contention to make before the case is over. I want to identify that. I just want to know about it. He doesn't know about it.

Witness excused.

H. R. MARTIN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Where do you reside, Mr. Martin?

A. Los Angeles, California.

Q. What is your business?

A. At present I am employed as an adjuster for an insurance company.

Q. What was your business prior to entering that line of work?

A. Bookkeeper for Rajotte, Fobert & Winters.

Q. Your occupation generally is that of bookkeeper?

A. Had been all during the time I was with Rajotte, Fobert & Winters Company, yes.

Q. Are you an accountant?

A. No, sir.

Q. Just a bookkeeper?

A. That is all.

Q. I will ask you whether or not you were in the employ of the Rajotte-Winters Company during the time they were engaged in the building of this logging road or railroad?

A. Yes, sir.

Q. Were you there all the time?

A. No, I wasn't there at the start. I went on the job about September 10, and at that time, not as bookkeeper. I went there to accept a position as timekeeper at another camp they had figured on opening about that time. I took the position as bookkeeper as I recall October 27.

Q. You went up on this work about September 10?

A. Yes, sir.

Q. And about how far had this work progressed at that time?

A. The day I arrived the steam shovel was right

opposite Camp 1. I don't recall the station number. I think it was about 132. Somewhere along there.

Q. Was it east or west of the S. P. tracks?

A. West—east?

Q. East of the track?

A. Yes, sir.

Q. Now, Mr. Martin, at the time you went there, did the Rajotte-Winters Company have a bookkeeper?

A. Yes, sir.

Q. And what was his name?

A. Mr. Rackcliffe.

Q. When he left did you take on the work he was doing?

A. Yes, sir.

Q. That is the bookkeeping?

A. Yes, sir.

Q. During the time you were there, did you have occasion to see him make entries?

A. I did.

Q. Various entries. In other words, you could identify his handwriting?

A. Yes, sir.

Q. You would know his handwriting?

A. Yes, sir.

Q. Now, just state generally, Mr. Martin, the nature and character of the entries you made on this work for them.

A. Well, I kept account of the time and distribution of the labor. I made up the payrolls, and paid off the men, made out the checks, paid all bills for supplies

and material that Rajotte & Winters got, and made distribution of those vouchers and turned that over each month to the Whitney Company.

Q. You made up vouchers for that?

A. What I have reference to as vouchers, our checks we called; every time we paid a check out for any bill, that was a voucher, because we made it up in voucher form to distribute the distribution, where different accounts to be charged.

Q. You kept a record of the money actually expended by the Rajotte-Winters Company?

A. That is it.

Q. Would that record, the sum total of that record, the total amount spent for labor, etc.—would that show the actual amount of money that railroad cost?

A. By no means, no.

Q. What other items would enter into that that you have no record of?

A. Such as powder and explosive of all kinds, and coal, and small tools and things like that the Whitney Company purchased.

Q. Why wouldn't you have a record of that?

A. I would have no way to get it. They bought that and paid for that themselves.

Q. Did they report to you from month to month for what they expended every item of that nature?

A. No, they made no report to us for what they expended.

Q. Now, by referring to these records which you kept, and the records kept by Mr. Rackliffe, I will ask you to state whether or not you are prepared to tell

the Court at this time what the total expenditures of the Rajotte-Winters was upon that roadbed?

A. Yes.

Q. And what did you take that from?

A. Took it from the poyrolls and the total number of vouchers, that were paid on bills.

Q. Have you all of those vouchers and payrolls?

A. I have.

Q. In the courtroom.

MR. DOBSON: We can introduce these all in the record.

MR. FREED: No, we have no objection, but we would like to have the privilege of checking if different from our figures. I think our figures will jibe.

Q. Now, just state to the court what your records show, what the expense of the Rajotte-Winters Company in the construction of this roadbed—on the work, were there?

A. Well, the record as I have it shows the total amount of the vouchers as the Whitney Company reimbursed us on.

Q. Just explain to the Court what you mean by that?

A. Each month I would render the Whitney Company a report showing the payroll, the net amount of the payroll which we paid the men, or total checks and, in addition to that, I would make up a list of all of the checks that we had paid on bills; wasn't much a matter of bookkeeping, just a matter of record, making up a small report. Then they would reimburse us; they would check with their accounts. If it did, they would

send us back a check for what we had been out, plus our percentage, plus five per cent on the bills we had expended, and the total of all the vouchers which they paid us was \$207,738.28.

Q. Now, you refer to vouchers. Does that mean statements made up and sent to the Whitney Company?

A. No, I mean that as a total of their checks they rendered and paid us each month.

Q. When you received one of these checks, what record did you have of the fact that they sent you this check for this amount of money?

A. What record I had? Every month we sent statement right along with it showing how that amount was made up.

Q. Did you keep that statement?

A. Yes, I kept a copy of it. The original I guess they sent to the Spokane office.

Q. Then in arriving at this amount you have taken the total of these statements?

A. That is it.

Q. Now, just what would those vouchers cover, in a general way—I don't mean detail.

A. The total amount of this voucher I gave you, that is made up as follows—that is the way distributed: Net amount of Rajotte-Winters payroll, \$141,696.49. On top of that is \$33,689.67 which was the total amount of bills paid by us which they reimbursed us for.

Q. In a general way, what would that be for?

A. Well, up until they took over the cookhouse, that would be for all groceries we bought, and for every-

thing we should happen to buy that should go on the work.

Q. That would be part of the cost of the work?

A. That is the grocery bill, meat bill, anything we paid that would be changed to the Whitney account, that is what we included. Then they paid us a percentage on the force account work. Percentage on the force account is \$616.36.

Q. Why is that? That is not work that came within the purview of the contract.

A. That is what is termed extra work, which he paid us an additional five per cent on.

Q. That was outside the contract entirely.

MR. FREED: Did you say five per cent?

A. That is additional. We had been paid the roll. That was separate work they gave us an additional five per cent.

MR. FREED: Ten per cent on that.

Q. Ten per cent on the force account.

COURT: What was the amount of the force account?

A. The amount of the percentage we received?

COURT: No, the total amount of force account. You said the company paid you two hundred and seven thousand dollars in round numbers.

A. The total amount of the force account work is \$12,687.39.

COURT: And five per cent amounted to about \$10,000 on the \$207,000. That is, the \$207,000 included that five per cent.

A. Yes.

COURT: So the work actually within the terms of the contract cost about \$175,000?

A. The actual cost of the work, yes. What I gave you was the total of the vouchers that they accepted and agreed to be paid and had reimbursed us for.

COURT: That included five per cent and force account beside?

A. Yes.

COURT: And the extra five per cent on the force account?

A. Yes, sir. And the total percentage received; that is, on the payrolls and vouchers, \$9,062.21; and total amount of the vouchers that were issued, for which we were not allowed the five per cent—as I understand it, the contract said we would not be reimbursed for oil and waste and things like that—that was \$3673. Rent of equipment was \$21,500. That makes up the \$207,000.

COURT: Have you a statement of the actual cost of the work that was in the contract?

A. I haven't any, no, sir.

COURT: To ascertain that it would be necessary to deduct \$12,687 for the force account, \$9,662 for the percentage, \$3,673 for the waste.

A. No, that amount goes to make up the cost, really.

MR. DOBSON: Just a moment. At that point I want to make a point clear. The \$21,000 for the rental was not intended, as we will show, to be a profit to us. The Contract required the defendant to furnish us a steam shovel outfit. It didn't mean profit to us.

COURT: What I was getting at was this: It has been stated that the plaintiff expected to do this at a cost of not to exceed \$100,000. Now, I am rather curious to know how much it actually cost them.

A. Wouldn't the five per cent be part of the cost? That is the way I have made my totals. I have added the five per cent. They expected to pay that. That is part of the cost.

MR. DOBSON: On that point the contract says in so many words, in arriving at the base cost which the parties contemplated would be about what they estimated, they were to include this percentage, so we are taking all these figures into consideration.

MR. FREED: That is not my view of it, but I don't want to interrupt you now.

COURT: That doesn't include the force account of \$21,000.

MR. DOBSON: No, it doesn't include the force account or the rental of the plant.

COURT: That is \$37,000.

MR. DOBSON: The situation is the same as if the defendant had to rent a steam plant from some one else.

A. I am not finished. In addition to that was \$5,-661.85, which was paid us on steel contract, laying steel, That was extra.

MR. FREED: Different contract.

A. What I am trying to do is to show you how this total amount of \$207,000 is made up.

COURT: That is what I want to know.

A. Besides that if \$499.50, which they paid us on ballast contract. That was extra contract. Then there were deductions to come from that; in order to get the total of this amount, if you add all these figures I have given you, you have got to make a deduction of \$8,-044.44, which is deductions shown on the vouchers for board of subcontractors, and tools they advanced to subcontractors. That gives us a net of \$207,738.28, which they actually paid us on our grading contract.

Q. Mr. Martin, in arriving at this figure of two hundred and seven thousand, did you deduct this ballast work, the ballast contract?

A. Yes, that is what I just told you.

Q. You deducted that?

A. No, that goes to make up the total. The only deduction made is just what I told you, sub-board and charges against the subcontractors.

Q. Then to get the amount correct, you would have to deduct the amount paid on ballast contract and the amount paid on rail laying contract.

A. On the separate contracts, yes.

Q. I don't want to include those. I want to give the Court the correct amount that we claim the roadbed cost us, by the work we did under our contract for work on the roadbed, eliminating these two items.

MR. FREED: There were two or three different contracts here. That is admitted. There is the rail laying. We paid these same people. There was a contract for laying rails and laying the ballast later, and these were some of the things the witness is referring to, to be deduction.

COURT: Including that under force?

MR. FREED: No, a different contract.

MR. DOBSON: I want it understood those are contracts in no way under controversy.

MR. FREED: I understand, but he included it in the \$207,000.

A. I included that because you asked me how much they paid us on total work, and that is how I arrived at it. Subtracting the amount that was paid us on that track and ballast contract would leave a balance of \$201,576.93.

COURT: But you haven't deducted the force account nor rent from that, have you?

A. No, sir, that is all given in that.

COURT: That is thirty three or four thousand dollars.

MR. DOBSON: We don't want it understood that we concede this rental is not a part of the cost of building this roadbed, upon this theory: If they hadn't rented our equipment, they would have to rent from some one else. They were to furnish the equipment, and, instead of renting from some one else, they rented from us. We don't want to be confused on that being for profit, fifteen hundred for the steam shovel claim. It is just the same as if we spent that twenty one thousand for labor—it is the same principle.

COURT: I understand the Whitney Company rented this plant from you, and paid you fifteen hundred a month for it. In other words, the Whitney Company were to furnish the plant, and they rented it from you.

MR. DOBSON: Yes.

Q. And now you want to include that in your cost of building this road?

MR. DOBSON: We contend that every item of expense, whether we expended it on rent, or whether we spent it on labor, entered into the cost of building this road, because in their contract, when we came to the contract—I am not certain about this rental being one of the things we are going to consider—but it covers practically every item in the expenditure as going into the cost to determine what the road actually cost.

COURT: I just want to get your view of it, that is all.

A. I might add here there is additional cost.

Q. I was going to get that. What was the total you gave after deducting the rail laying contract and the ballasting?

A. \$201,576.93.

Q. That would not include any items that the Whitney Company spent for powder and other items you know nothing about?

A. Powder and coal and groceries, and stuff of that kind, I would not.

Q. Your contract provided the Whitney Company should furnish coal and powder?

MR. DOBSON: There were certain things they were to furnish, as I understand. This is what is called a cost plus percentage. The contractor was to be reimbursed upon the total cost of the road.

COURT: Regardless of who expended the money?

MR. DOBSON: That is our theory. That is the reason we are putting in these things.

Q. While on the stand, Mr. Martin, there are some other items that might be of interest to the court. You have made a distribution, haven't you, showing where this money was actually—what it was spent for. That is, how you distributed your labor upon the various parts of the work. I will ask you to state what part of that amount that was expended by the Rajotte-Winters Company was for what we call hand and team work.

A. You mean hand grading?

Q. Yes.

A. The hand grading amounted to \$47,853.77.

Q. And have you got segregated there what amount was expended in connection with the operation of a steam shovel plant, removed by the steam shovel plant?

A. Steam shovel grading, \$63,231.46. Now, I might add there for their benefit, in case that don't check, they kept the steam shovel grading a little different. They added the blacksmith work and distributed that. I just kept a separate item. The distribution might not check, but the totals will check with them, because we checked on it.

Q. And your office expense or overhead?

A. \$5,323.64.

MR. FREED: Overhead where?

A. That was just the payroll office expense on the job.

Q. Did that overhead include any salaries to the officers of the company?

A. To the officers? No, not to the officers.

Q. Just generally, what did that cover?

A. That simply covered my expense and the time-keeper's expense.

Q. That is, your salary practically?

A. Yes, sir.

Q. I suppose that would cover money you might have spent for stationary supplies?

A. No, the Whitney Company bought that.

Q. Now, camp construction, what amount was expended for that?

A. \$5,881.36.

Q. Was that distributed?

A. By different camps, yes. That was labor distribution, total cost labor distribution at different camps.

Q. When you would submit your monthly vouchers or statements to the Whitney Company, would there appear on that statement some item or memorandum indicating that you were billing them for an added expense which you would call overhead or office expense?

A. No.

Q. Was that disclosed to them on this statement?

A. I didn't bill that, what you term bill that. At the end of each month I made up a statement which showed net payroll. Another statement showed total vouchers paid out. Then we included all the vouchers so they would check.

Q. Those vouchers which you enclosed, were the amounts of the checks which you had paid out, showed to whom paid and what for?

A. Yes, receipted bills, and have all been reimbursed.

Q. Did they keep these vouchers, or did they come back to you?

A. No, the Whitney Company kept the original bills of these things.

Q. You just have copies?

A. We just have copies.

Q. In making up this, you took from the copies?

A. Yes, I took from the copies, and our book record.

Q. Now, just state what this shows with respect to cookhouse labor.

A. Cookhouse labor was \$18,086.03.

Q. That is for the entire?

A. I can go through this, and call all the distributions for you.

Q. Just give the totals.

A. The total of Rajotte-Winters payroll was \$220,502.60. That is the total of our payroll. That is made up as follows: Camp construction, \$5881.36; office expense, \$5,323.64; moving outfit,—I mean by that moving on the job and off the job, such as that—\$1,779.56; steam shovel grading, \$63,231.46; clearing right of way, \$10,013.27; grubbing right of way, \$3,065.16; dinky track, that is laying the track for the small engines, what we call dinkys, \$5,441.41; building temporary trestle—that isn't the trestle that remains, that is simple trestle built to make the fills on, \$7,129.12; cookhouse labor, \$18,086.23; extra work, force account, \$12,687.39; barn account and team account, \$2,752.55; unloading coal, \$286.12; freighting to camp, \$1,668.11; coyote holes—which is making holes to shoot rock, we call them

coyote holes,—\$546; surfacing the track, \$7,698.07. That is going back, and keeping the track laid up in condition. Repairs to wagon road, \$189.63; blasting, \$473.26; finishing grade, \$10,473.71; contract work laying the track—that is in addition to the work we took on contract—\$7,271.81; contract ballasting was \$5,189.61; ballasting the track, not contracted, \$167.55; hand grading, \$47,853.77; moving camp \$809.07; making ferry crossing, \$9.00; man employed to hire labor, \$47.25; blacksmith repairs, \$2,435.67. I might say, your Honor, that perhaps the Whitney Company and us will not check as to distributions, but we will check on the total. They had one way of keeping and we had another, which was immaterial.

Q. There is a question which I forgot to ask. Was the amount that was paid to Mr. Sweeney on the clearing contract and the culvert contract, was that included in these figures?

A. That is not in here. The Sweeney payroll was carried separately. This is the amount of the Rajotte-Winters contract.

Q. As I understand, Mr. Martin, you carried that Sweeney payroll, didn't you?

A. Yes, we did, yes.

Q. And the Whitney Company reimbursed you for that?

A. No. the Whitney Company didn't reimburse us for that. The Whitney Company didn't reimburse us for the Sweeney payroll at all. That was simply charged against the Sweeney account, and in the monthly settlement we got, was credited to his ac-

count, but they didn't reimburse us for the money we expended on the Sweeney account.

Q. While we are on that, have you any way of referring to that account and be able to tell the Court what difference we claim to be due from the Whitney Company on the Sweeney contract?

A. Yes, the Sweeney account stands \$2,007.80 in the hole. In other words, we advanced on the Sweeney account \$13,754.33, and we received from the Whitney Company to apply on his account, \$11,746.52.

Q. In connection with that Sweeney account, did you ever have any conversation with Mr. Norris, or any one connected with the Whitney Company concerning the manner in which it was handled?

A. No, I never did. When Mr. Sweeney came on the work, either Mr. Glavin or Mr. Rajotte said we would carry his payroll, and that was all the conversation I ever had about it.

Q. And you haven't included that amount in your calculations here?

A. No, sir, that was separate. This is Rajotte-Winters that I have given you on the grading contract. The Sweeney's I have kept separate, and I have given you separate.

Q. In plaintiff's second cause of action we have alleged there is still due us from the Whitney Company by reason of money advanced, an item of two thousand and seven dollars and some odd cents, and that is the amount you are now referring to?

A. That is the amount it will take to square us up on the Sweeney contract.

Q. What I want to bring out is this: can you not recall a letter, or any talks with any one indicating that they requested you, or rather the Rajotte Company to make these advances? Was that handled by you in any way?

A. Well, yes. They never requested us, no, but when Mr. Sweeney came on the job, as I said, Mr. Rajotte or Mr. Glavin said we would handle his account.

Q. I want to know whether you ever had that information from any official or agent of the defendant in this case?

A. No.

Q. You got that information from Mr. Rajotte or Mr. Glavin?

A. Correct.

Q. But your records show that they still owe the Rajotte Company, that is the defendant owes the plaintiff, two thousand and seven dollars and what is the odd cents?

A. Eighty cents.

Q. On the Sweeney account?

A. Yes, sir.

Statements offered in evidence and marked

“PLAINTIFF’S EXHIBIT 4 AND 5.”

CROSS EXAMINATION

Questions by MR. FREED:

Q. Now, Mr. Martin, from all these figures can you tell the Court what the plaintiff expended on this grading contract, leaving out the rail contract, the ballast contract, the force account outside of the contract, and the percentages we paid you?

A. I haven’t prepared a statement leaving out the percentages, no.

Q. With the percentages?

A. I have them. I can get it from the statement I just gave you.

Q. From this statement it could be worked out, but you are not prepared to tell the Court the amount the plaintiff expended on the grading contract?

A. No, not until I make the proper deductions.

Q. You don’t know.

A. No, sir.

Q. And where, for instance, you show in that statement that so much was paid for a blacksmith, would the statement show that?

A. Yes, sir.

Q. Where the statement shows so much was paid for blacksmith, are you prepared to say where that blacksmith worked, that is, what he was doing; that is, whether he repaired a steam shovel, or whether he helped you on the rails?

A. No, I can tell you this, that it does not include the blacksmith's work that he done on contract; that is for ballast work and for track laying, but I didn't distribute the blacksmith work on anything else. Just kept his account on blacksmith. I mean doing repair work to steam shovel or other things.

Q. What I mean is, are you sure that when you have charged for blacksmith work there it went into the grading contract, this particular contract we are all talking about?

A. No distribution of labor. That blacksmith is total amount of expense of blacksmith work.

Q. You don't know but what some of it went into the other contracts or into force account?

A. I can tell you by going through the force account bills.

Q. I mean, as far as this record goes, you don't know?

A. No, sir; that agrees with the total payroll, you see.

Q. Now, as far as your bookkeeping is concerned, it is a fact, isn't it, that the force account is something outside of the contract?

A. Yes, sir.

Q. That is what the force account is?

A. Yes, sir.

Q. Now, I used to illustrate, blacksmith, taking that just as an example. Now, taking any other special kind of work throughout this statement here, for all you know from this statement, some of that might have gone into other jobs than the grading. Isn't that so?

A. I have a separate account of a steel laying contract, money that we expended, which is given there—I think I see the point you are getting at.

Q. I want to know this. I don't want to twist you up. I want to know if everything that you have got down there would be grading contract. For instance, you put so much for blacksmithing. Are you sure that none of that sum that you have put in for blacksmithing went anywhere else except on the grading contract?

A. Yes, it did. Went on both ballasting and the other.

Q. Just to save trouble by going through each item, I might ask you if any other item than blacksmithing is in the same condition?

A. I don't recall any.

Q. I was a good guesser. I just happened to pick out blacksmithing.

A. I might say, so the Court will understand, any blacksmith work we did on their account the proper deduction was made in making settlement with us on these two separate accounts. We did keep exact account of blacksmith work chargeable to ballasting and track laying, and when making settlement of these accounts it was deducted.

Q. Take another item. You charge us in there for overhead office expense. How much of that was for the track laying, and how much for the grading?

A. I have no way of telling that.

Q. Then, as a matter of fact, part of that you have in there under office expense would be against the

track laying contract, wouldn't it? That is, part of the office expense would be due to that.

A. You can't say track laying, that it took up two minutes extra office work to do that a day.

Q. I know, but that was done at the same office, wasn't it?

A. The same office handled all of it.

Q. The ballasting contract done at the same office?

A. Absolutely.

Q. The force account came from the same office?

A. Yes, all of it.

Q. What about what you people call the cook house account? What about that?

A. Same thing. You couldn't keep a thing like that separate, would be impossible.

Q. I am not criticizing the bookkeeping, but I want to show the Court that these items, some of them that you have charged in there are not properly chargeable to this grading contract alone. That is a fact, isn't it?

A. Those items that I just gave you first, I did include the ballast as I told you, as a total on the payroll, as I called off the items how it was made up, and I didn't say whether applied to any one of them, just showed how made up.

Q. I am not saying you contracted yourself. The only way I can get it in the record is to ask you, and have you answer. How about camp construction?

A. That would apply. You don't need to pick them out. Would apply to everything.

Q. That applied to all contracts?

A. Everything.

Q. In other words, any such item that could be applicable to more than one contract applied to all?

A. I don't see how it could help.

Q. Now, that Sweeney account, have you a copy of that account? Did you put it in the record?

A. No, that didn't go in the record.

Q. Let's look at that a little while.

A. I have the Sweeney account.

Q. That shows the payments made to you, the plaintiff, on the account of the Sweeney account by the Whitney Company?

A. Yes, sir.

Q. Have you a credit entered for rebate to Sweeney for clearing tools that were returned to the Whitney Company, \$55.28?

A. No, sir; I haven't that item.

Q. Have you this item? Refund to Sweeney from State Industrial Accident Commission premiums for which Rajotte, Fobert, Winters made a claim in the sum of \$82.11?

A. No.

Q. Have you this item? Cash advanced to Sweeney in excess of salary paid him for every day he was on the work, \$350?

A. I have.

Q. You have the sum of \$350?

A. \$350 made up as \$200 and \$150.

Q. Do you have the dates?

A. Yes, I have them. May 1, advanced \$200. June 17, \$100. And October 5, \$50. I might add, with re-

spect to this: If there are some credits which you had for that Industrial Accident, that was one I added up and was in line to be paid when I turned over the books. I don't doubt that it came in. It should have come in anyhow.

Q. Have you the item of \$358 which was the final payment on the Sweeney clearing sub-contract? Payment to you by the Whitney Company of \$358?

A. The last item I have on the Sweeney contract is October 11, check for \$684.20.

Q. You have no payment for \$38.12?

A. No, no payment of \$327.76 in September for clearing.

A. The last amount is six hundred dollars?

A. I haven't got that—\$684.

Q. When I ask about this \$650 cash advanced, I mean cash advanced to Sweeney in excess of salary paid him?

A. Yes.

Q. Have you an item of this kind, not the Whitney Company paid to the plaintiff, but have you a credit?

A. A credit?

Q. \$868, being 108½ days' salary to Sweeney at \$8.00 a day. I understand you paid him a salary?

A. He was carried on the payroll, yes.

Q. He was carried at \$8.00 a day?

A. I believe the sum was \$8.00. I can tell by referring to the payroll, but I think it was.

Q. What credit have you for salary?

A. It is included in his advance. It goes to make

up the amount of the rolls we paid to Sweeney. That goes to make up the total of \$1374.

Q. You haven't that \$868?

A. Not segregated. I have it totaled in the payroll.

Q. But you people, in settling—that is the plaintiff in settling allowed Sweeney \$8.00 a day salary; that is, paid that amount.

A. He was carried on the payroll.

Q. And he was a sub-contractor?

A. Yes.

Whereupon proceedings herein were adjourned until 2:30 Monday afternoon, October 29, 1923.

Portland, Ore., Monday, October 29, 1923, 2 P. M.

H. P. MARTIN resumes the stand, for

FURTHER CROSS EXAMINATION

Questions by MR. FREED:

Q. I just have one question to ask: you said that your accounts showed—the plaintiff's accounts showed that Mr. Sweeney, the subcontractor for clearing, had been paid about two thousand dollars more than the plaintiff had received from the Whitney Company?

A. Correct.

Q. That is in round numbers two thousand dollars?

A. Yes.

Q. And I believe that your statement that you referred to—probably you answered the questions

on it—showed that to make up that two thousand dollars, or rather, included in that two thousand dollars was about one thousand dollars that was paid to Mr. Sweeney direct by the Whitney Company. Do you remember?

A. I have no record of that thousand dollars that was paid.

Q. Have you your statement that was referred to yesterday?

A. Yes, I have.

Q. I don't want to question you on anything outside of that.

A. Yes, that thousand dollars that the Whitney Company has paid Mr. Sweeney is not taken into consideration. Had we received that thousand dollars, in other words we would not be two thousand dollars behind on that account.

Q. That is what I mean. Not having received that thousand dollars, you were two thousand dollars short? I am speaking in round numbers.

A. Yes, that is right.

Q. If you had received that thousand dollars, you would only be one thousand dollars short?

A. That is true.

Q. That is the reason I am going to the elementary. I wanted to understand you. Now, Mr. Sweeney testified, as you heard, that that thousand dollars was paid to him on account of culverts.

A. I heard what he said.

Q. How do you include that, then, under your grading?

A. We carried his payroll on the culverts just the same as we did on anything else.

Q. But you don't pretend, do you, that culverts, building culverts, is part of the clearing?

A. No, that culvert working, I understood it was a separate agreement between Mr. Sweeney and Mr. Norris which I knew nothing about; we was carrying his roll right along all the time, and while he quit clearing for the time being, he went ahead and did this culvert work. I had no way of knowing what the agreement was. I assumed that we would pay that.

Q. I just want to get this, do you understand, or don't you understand, that that thousand dollars which the Whitney Company paid Mr. Sweeney direct, was on account of culvert work?

A. Yes, I understand.

Q. Now, did that two thousand dollars deficit that you spoke of include or take into consideration the fact that your company allowed Mr. Sweeney, the subcontractor, eight dollars a day salary?

A. Yes, sir.

Q. In other words, if he worked one hundred days—he worked a little more—but if he worked one hundred days and you allowed him eight dollars a day salary, that would be eight hundred dollars?

A. Eight hundred dollars.

Q. And if you had not allowed him eight hundred dollars, your deficit would be cut down eight hundred dollars more?

A. Yes.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Were you up and down the work—the line there—frequently, while Mr. Sweeney was engaged upon this culvert work and fill?

A. Yes, occasionally.

Q. Just what did Mr. Sweeney do?

A. You mean, when he was making the culverts?

Q. Yes, when he was making culverts; take that first.

A. Well, he made them out of timber that he cut right on the ground.

Q. What I want to get at is this, was he engaged in physical work, or actual work of some kind, on this culvert work and on the clearing contract?

A. Yes. As I understand it, Mr. Sweeney, I believe he had men working on clearing at the same time he himself did culvert work, although I am not sure about that.

Q. Counsel brought out the fact he was paid a salary of eight dollars a day?

A. Yes.

Q. Was he doing work the same as the other men there?

A. He was, yes. In other words, if he hadn't been paid the eight dollars a day he would have had nothing.

COURT: He was a contractor, wasn't he?

A. Subcontractor.

COURT: Doing the work at so much per acre?

A. Yes.

COURT: Or per unit.

MR. DOBSON: Some of these questions I am going to ask, to avoid confusion, pertain to our second cause of action. We claim there is a balance due us on moneys advanced.

COURT: For money you paid to Sweeney?

MR. DOBSON: Yes, we were carrying Sweeney on the payroll; that is, his men. All the employes on his payroll were paid by the Rajotte-Winters Company, the plaintiffs in this case, as the men directly in their employ. The only difference was they were working under subcontract. In our contract, it was our contention the Whitney Company was to reimburse us for the money we expended, and it would not make any difference whether the men whom we paid were working for a subcontractor or working directly for us. Our contention is, we are to be reimbursed for all of this, and that is what this line of testimony I am taking up now has reference to, money we expended and not reimbursed for.

Q. Mr. Martin, I understood you to testify on direct examination just before court adjourned Saturday that your books show a balance of two thousand and seven dollars and some odd cents still due the plaintiff in this case by reason of money expended for payroll on the Sweeney contract. Is that correct?

A. The Sweeney account stands two thousand and seven dollars and eighty cents, as I told you.

Q. I understood you to say just now you also

carried Sweeney's payroll account for culvert contracts as well as for clearing?

A. Yes, sir.

Q. Now, does this two thousand and seven dollars include money advanced on both contracts or does it apply to just one?

A. On both of them; money we paid his laborers on both contracts.

Q. I will ask you to state whether or not you ever had any conversation with Mr. Norris or any agent of the Whitney Company wherein the matter of this balance that was paid out for money advanced in the manner you just referred to was brought out?

A. I don't recall any, no.

Q. But that is what your records show at this time?

A. Yes, sir.

Q. There is another item, Mr. Martin, referred to on our second cause of action, I believe, referred to as the Heiner & Reed bill; just state what that was for?

A. That was for repairs done on the steam shovel and donkeys at the time that they both broke down.

Q. And just why was that charged to the account of the defendant in this case?

A. They were to pay for all repairs on the work.

Q. And that was a part of the cost of this work, was it?

A. Yes, sir.

Q. That was one of the things you were to be reimbursed for?

A. Yes, sir.

Q. Now, did you ever have any discussion with anyone connected with the Whitney Company, the defendant in this case, with respect to that bill?

A. Yes.

Q. What was that?

A. As I remember it, there was two or three different discussions and one may have been before the other, but there was one discussion and Mr. Norris thought the bill was too high, as I recall it; thought they had charged us for more hours or more material than they had actually used, and I went to Heiner & Reed's bookkeeper and one of the firm, and we checked that over, and they did reduce the bill a small amount. Then I passed the bill at that time to Mr. Rajotte to take it up with the Whitney office in here.

Q. As I understand your testimony, you first had a discussion with the Whitney Company, someone connected with the Whitney Company, with reference to the amount of this bill. Who was that conversation with?

A. Mr. Norris.

Q. Did he ask you to pay the bill at that time? That is, any part of it?

A. I don't know whether he did at that time or later. They did object, however, to paying it, as I remember, because they thought the work should have been done through their machine shops.

Q. Was that the only objection to it?

A. That and the first objection.

Q. To the amount?

A. When they thought it was too much, and we got a reduction.

Q. Why was this machine not repaired in their shop, if you know?

A. As I recall, Mr. Glavin, when the machine broke down, phoned direct to the Heiner & Reed people because he thought, or he understood, that the Whitney Company were not equipped to do that heavy repairing.

Q. Was it something that was necessary to be repaired immediately?

A. Absolutely; both broken down and not able to work.

Q. Just a matter of saving time?

A. That is all.

Q. Did you explain that to Mr. Norris?

A. Well, I think he knew that; I think he knew the conditions. He was familiar with them the same as I was.

Q. He was on the work at the time, was he?

A. Yes.

Q. Now, Mr. Martin, since you were on the stand Saturday, have you had occasion to go over the figures you submitted to the Court at that time as to the total cost of this work?

A. Yes, sir.

Q. Have you discovered any changes you would like now to make with respect to these quantities?

A. Nothing more than the total cost of the work as I look at it would be the total of the payroll.

Q. That isn't the question that I asked you. The question is this, whether or not, after you have gone over these figures, are there any revisions or corrections that you think—rather, not what you think, but whether they should be made?

A. No, I don't know of any corrections needed to be made.

Q. I understood that you had made some changes there, or I wouldn't have asked this question.

A. No, we simply arrived at it another way around was all that I did.

Q. Mr. Martin, I am not sure that this is in the record properly, but I want to be sure it is understood. Have you included the rental in making up this total figure, I think, of two hundred and seven thousand dollars, or thereabouts? That is the rent on the steam shovel?

A. Yes, the two hundred and seven thousand dollars you refer to is the total of Whitney vouchers paid us, and that included twenty-one thousand five hundred rent.

Q. Does that include the 5% on that rent, too?

A. No, sir, it does not.

Q. Any percentage or profit?

A. No percentage on the rent.

RECROSS EXAMINATION

Questions by MR. FREED:

Q. Do you know that the defendants in this suit

have notified the plaintiff that no repair work was to be done without first consulting them, otherwise they wouldn't pay for it?

A. Yes, I believe they did notify us.

Q. Wasn't that prior to this Heiner & Reed repair bill?

A. Correct.

Q. And, in spite of that you say that this was taken up direct with the people who did the work, who repaired the engines?

A. That is the way it was handled, as I recall it.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Just one other question; did you include this eight hundred and thirty nine dollars, this Heiner & Reed repair bills, in the amount that goes to make up the total cost referred to?

A. No, that is not included.

Q. And you eliminated the force account work?

A. Force? Yes.

Q. And the work of the ballast contract and the tracklaying contract.

A. Yes.

COURT: You say that was excluded or included, the track and the ballast. What is this eight thousand deduction? What does that cover?

A. "Less reduction of \$8044" you refer to?

COURT: Yes.

A. That was the reduction that was made on board of subcontractors and such as that?

COURT: But you did include in the two hundred and seven thousand the rent and track and ballast?

A. Yes, the two hundred and seven thousand includes everything; total of all vouchers paid us by the Whitney Company, and I gave hereabout the last of my testimony there the totals of the track and ballast and we subtracted that from the two hundred and seven thousand dollars at the request of the Court.

COURT: You subtracted that from what?

A. The two hundred and seven thousand dollars; you decided that should not be in the two hundred and seven thousand.

Q. Then, Mr. Martin, I am not sure I understood your figures. After eliminating these contracts not included in the two hundred and seven thousand dollars.

A. No, it was two hundred and seven thousand dollars you have reference to, is the total of all vouchers paid the Rajotte Winters Company by the Whitney Company, and it is made up of the net payroll, the vouchers that were paid, and the percentage and the rental; that is how the two hundred and seven thousand is made up.

Q. Then what would be the net cost of this work after deducting these contracts? That is, the work involved in this particular contract?

A. Subtract the track and ballast, that is what I did the other day and gave the total; he has it on the statements that I turned in. The total track work

and ballast work is sixty-one sixty-one thirty-five. That deducted from two hundred and seven thousand leaves a total of \$201,576.93.

Q. And that does not include any items that may have been spent by the Whitney Company that you know nothing about?

A. None whatever. This just includes the items that we spent.

Q. Mr. Martin, I did forget to ask you this; Mr. Freed referred to the fact that certain charges, that is, blacksmith charges, were not segregated with respect to the ballast contract and track laying contract from the grading contract; have you any idea about what that would be?

A. Well, it would be very small; perhaps one month two or three dollars; they did segregate that, the Whitney Company did; they showed the charges of blacksmith work against ballast work on our vouchers.

Q. Do you recall the largest items that was ever shown on these vouchers?

A. The largest one I ever saw that I recall, I believe, was \$21.00 charge as blacksmith work against this work.

Q. On track laying or contract?

A. Yes.

Q. Would that cover both? Did you have any memorandum showing the amount in connection with tracklaying or contract?

A. Perhaps twenty dollars would cover it, six dollars one time, eight another, four another. That

would be work that the blacksmith might do welding some particular tool on that work requiring a few minutes.

MR. FREED: This Heiner & Reed bill of eight hundred and odd dollars which I questioned you about a moment ago, that is included in your second cause of action, isn't it?

A. I think it is in, yes.

Witness excused.

MR. B. J. PARKER—A witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Where do you live, Mr. Parker?

A. At present in Oregon City.

Q. What is your business?

A. General construction, foreman and superintendent.

Q. General construction?

A. Sub-contracting.

Q. In any particular line?

A. Why, on this case involving——

Q. I mean general construction, you mean building railroad and roadbed?

A. Yes, sir.

Q. Do you know the plaintiff in this case or his representative, Mr. Rajotte?

A. Yes, sir.

Q. You know the defendant, the Whitney Company, and Mr. Hawkins, its president?

A. I do.

Q. Do you know Mr. Norris, the engineer?

A. I do.

Q. Or who was the engineer, I believe, at the time this work was going on. I will ask you to state what, if anything, you had to do with the building of this road-bed for the defendant in Tillamook County?

A. I had the bridges.

Q. How many bridges were there?

A. Three.

Q. What were they? Just state what streams.

A. Kilches, Clear Creek and Sam Down's.

Q. You had no other bridge contracts?

A. None—well, yes, we had a logging dump.

Q. Do you recall about when that contract was made, or whom you made it with?

A. It was October 18, I believe, 1919.

Q. With whom did you make that contract?

A. Mr. Hawkins.

Q. Have you the contract with you? (Witness produces.) Is this the only writing you have had, or is that the only contract you had, that letter?

A. The one originally, no; this is just letter confirming.

Q. You had just the formal, written contract, didn't you?

A. It was a good bit this way.

Q. That is not the contract you made originally?

A. Very near the same.

Q. Was the contract made about the same date?

A. I don't know.

MR. FREED: We don't seem to have a copy.

MR. DOBSON: If you had it, you would submit it?

MR. FREED: Yes.

MR. DOBSON: No dispute as to when the contract was made?

A. I suppose not.

Q. Do you recall whether that contract was between the Whitney people and yourself or between the Ratjotte-Winters people and yourself?

A. Whitney Company and ourselves?

Q. Rajotte-Winters Company had nothing to do with that contract?

A. Nothing whatever, only I believe they recommended us.

Q. But they were not parties to the contract?

A. No.

Q. Just about when did you start to build the bridges in question on that work?

A. I believe we went on the 1st of November, 1919.

Q. And at that time was the plaintiff, Rajotte-Winters Company— At that time was the contractor, the plaintiff in this case, were they then on this work?

A. They were.

Q. Where did you start your operations?

A. On the Kilches River.

Q. And with reference to the other two streams,

was that near the beginning of the line, or was it further up the line?

A. It was up the line; I should say a mile or a mile and a half; possibly two miles; I don't remember.

Q. Sam Down's Creek was on beyond Kilches River?

A. Was still further.

Q. Further up the line?

A. Yes, the furthestest we went.

Q. The other creek still further up the line?

A. No; Clear Creek in between Sam Down's and Kilches.

Q. What were your plans as to the bridge to be built first?

A. Kilches River.

Q. At the time you went there, commenced your operations, the construction of these bridges, just where was the contractor, the plaintiff in this case? Where were they then working, do you know?

A. I believe I could tell you from the profile, somewheres near.

Q. This is plaintiffs' Exhibit 1?

A. They were about Station 206, I believe.

Q. In other words, they hadn't reached the Kilches River?

A. The shovel was in here; they were moving across this filling, I recollect;

Q. Are you mistaken? Wasn't it up further? Do you remember the cut referred to as Cemetery cut?

A. No, I don't; Cemetery cut as I remember is back here. This fill as I recall was completed and they were moving the shovel across it.

THE COURT: Across what?

A. Across this little fill.

COURT: What Station?

A. Between stations—the work was all completed to 220.

COURT: The work completed to 220 the 1st of November?

A. I think so.

Q. That is where they were working; you don't know whether completed or not?

A. No, you see the shovel was in here.

COURT: Where was the shovel?

A. Here between 210 and 220, moving across the fill that had been put in.

COURT: When you began work?

A. Yes.

Q. On the bridge at Kilches River?

A. Kilches River.

COURT: Was the shovel moved back again to 8 after that?

A. Moved back to the river.

COURT: Moved back to the river?

A. Clear to the water front.

COURT: It was moved back to the water front after that?

A. Yes, sir.

Q. What I want to get at is this: At the time

the shovel arrived at Kilches River, had you completed the construction of that bridge?

A. No, sir.

Q. How long after it arrived at that point before you had completed that bridge?

A. I don't know that I can answer that. I don't remember.

Q. Was it a day or two days?

A. Oh, yes, it was several days.

Q. You didn't keep any definite record?

A. No, sir.

Q. Do you know that they were delayed?

A. They were; they would have been delayed had they not moved the shovel back.

Q. Do you know about when they crossed the river; did they cross over your bridge?

A. They did.

Q. Do you know about when that was?

A. I don't know.

Q. When you started in, the 1st of November, was it before the 1st of December?

A. I don't remember.

Q. You don't recall?

A. No, I don't.

Q. Now, Mr. Parker, referring to the Kilches River bridge, at the time you started in your operations there, was the roadbed staked out or the center line shown?

A. Yes, sir.

Q. How was that shown?

A. You mean at the bridge site?

Q. At the bridge site, yes.

A. By line of center stakes.

Q. By line of center stakes. After you started in operation there, were there any changes made in these center line stakes?

A. At Kilches River?

Q. Yes.

A. No, sir.

Q. Was that bridge built just as you had originally contemplated building it?

A. Yes.

Q. With respect to the grade or line of the road-bed?

A. Oh, a few minor changes, but none in the alignment.

Q. Now, the next bridge you built, where was that?

A. That was at Clear Creek.

Q. And that was about at what station, if you remember? I think that is identified sufficiently, though, by Clear Creek.

A. That would be at 330.

Q. 330?

A. 330 on this profile.

Q. Now, about when did you start building that bridge?

A. I think it was in February.

Q. Of what year?

A. 1920.

Q. Now, were there any—at the time you started

in building this bridge, had the grade and right of way been established at that point?

A. There was a change in Clear Creek.

COURT: What?

A. There was a change of alignment at Clear Creek.

Q. Can you state to the Court the substance of what that change was?

A. You mean the distance in feet from the original ?

Q. Just what you know about it.

A. The reason I know there was a change, because we helped clear the right of way after getting there. We used the donkeys and chucked out of that right of way. You see, the right of way had been cleared, and the stuff piled to one side in a wind-row. We afterwards moved that.

COURT: About how far did you move it?

A. About 30 feet; however, that wouldn't have any bearing on the line generally, because we moved it outside of the right of way.

Q. What I am trying to get at is, what change was made, if any that you know of, that would affect the work of the contractors in this case with respect to building up grade or line at that point?

A. Well, the alignment, of course, would affect their grade; the alignment was straightened on the bridge, so the bridge would be on a tangent; it would naturally go further back on the grade there one way or the other from the bridge.

Q. You say you commenced construction on that bridge in February, 1920?

A. I believe that is it.

Q. Was that bridge completed at the time the contractors arrived at that point to proceed across to the upper part of this work?

A. No, sir.

Q. About how much delay was encountered there approximately?

A. It has been three years; quite a strain on the memory, but I should say a week.

Q. About a week's delay. Now, passing on to the next place, which I understand was Clear Creek—

A. Sam Down's.

Q. Sam Down's; that is about what station, do you remember?

A. It would be at 380, along about.

Q. 380. Were there any changes made there with respect to the line or grade or roadbed that you know of?

A. I believe there is a curve taken out at Sam Down's Creek.

Q. There was a curve taken out. How much move one way or the other would that cause?

A. I couldn't say.

Q. You have some idea; was it any considerable amount, or just a foot or two?

A. Well, I don't know as to that.

Q. Did you know was a change made?

A. Those changes, as I remember, were all on the curve.

Q. As they are now?

A. On the old profile, but afterwards straightened.

Q. Does the original profile show those bridges on curve?

A. Yes, sir.

Q. And when they actually put the bridges in, they straightened the roadbed?

A. They straightened the alignment at the bridge or across the bridge.

Q. So as to straighten up the bridge?

A. So as to straighten up the bridge, yes, sir.

Q. Now, Mr. Parker, about when did you start the construction of the bridge on Sam Down's Creek?

A. I believe this was in April.

Q. April of what year?

A. 1920.

Q. Was that bridge completed at the time the plaintiff in this case, the contractors, arrived at this point to go on beyond that creek?

A. No, sir.

Q. Did I ask you about changes made at that creek? Were there—

A. Yes, in the alignment; not in the grade.

Q. Just in the alignment?

A. The alignment, yes, sir.

Q. Did those changes, if you know, in any way change the nature, amount of character of the work done by plaintiff in this case, if you know?

A. They necessarily had to change it.

Q. And what do you remember about that? That is what I want to get at.

A. Well, I know but very little about it, as to what quantities.

Q. I wasn't asking you to state the quantity, but did they have to make an extra fill or extra cut or what was the situation?

A. Well, I don't know; it would either reduce the amount of his cut, or lessen it—that is, it would be more or less, I mean.

Q. All you know is you know that the grade was changed there, or the alignment?

A. Yes.

Q. When you made this contract with the plaintiff in this case, you think it was sometime in October, 1919?

A. The 18th of October, 1919.

Q. So this contract was made in October, 1919?

A. Yes, sir.

Q. Was there any conversation between you and Mr. Hawkins with respect to the time you were to proceed with the construction of these bridges?

A. Only this letter.

Letter offered in evidence, received without objection and marked PLAINTIFFS' EXHIBIT 6.

Q. Now, Mr. Parker, referring to Plaintiffs' Exhibit 6 which is a letter directed to you by the Whitney Company, with the signature of Russell Hawkins, I will ask you whether or not you had any conversation with Mr. Hawkins prior to this time with respect to building these bridges?

A. No, sir, Mr. Shay would be the man who handled that.

Q. Did you have any conversation with him subsequent to that time?

A. No, sir.

Q. Do you know when the negotiations started between your Company, Shay & Parker, is that the name of the company?

A. Yes, sir.

Q. And the Whitney Company with respect to the building of these bridges?

A. No, I don't.

Q. You don't know about that?

A. No, sir.

Q. They began sometime prior to the date of this letter?

A. Oh, yes.

Q. Have you any idea about how long?

A. No, I don't.

Q. About how long were you engaged in that work, all told?

A. Until November, 1920, I believe.

Q. You were there, then practically a year?

A. Yes.

Q. Did you have any other contracts with the Whitney Company for any work other than that?

A. May I change that last answer?

Q. Yes, if it is not correct.

A. You were asking me how long I was there on those bridges?

Q. Yes.

A. We were done there in June on the bridges, the other was log dump.

Q. Did you have any other contracts with the Whitney Company with any other work?

A. Had this log dump also foundations for the—

Q. That log dump was in the mouth of the river?

A. No, that would be in the Bay.

Q. That had nothing to do with the contract between the plaintiff in this case and the Whitney Company?

A. No.

Q. When did you start your work on the log dump? About the same time as the other or prior?

A. No, that was later, about September, I believe.

Q. Did you have any contract with the Whitney Company for any work along this roadbed other than what you have mentioned, which you were doing or carrying on at the time you made the contract for the bridges?

A. No, sir.

Q. What was the first work you did up there?

A. The first work was the Kilches River bridge.

CROSS EXAMINATION

Questions by MR. FREED:

Q. You are working as a subcontractor under Mr. Rajotte now?

A. No, I am working as foreman.

A. Sir?

A. I am working as foreman for him.

Q. You are in his employ now?

A. Yes, sir.

Q. Did Mr. Rajotte get a per cent of your pay in this bridge work?

A. He did.

Q. Tell the Court how much Mr. Rajotte got from you as a rake-off out of this?

A. He furnished me the money, understand, and if I made a profit, he was to get ten per cent.

Q. Do you remember how much you paid him or what profit you made? We can figure it out from that.

A. No, I don't know exactly.

Q. Don't have any idea?

A. Well, I wouldn't know offhand, no. I could possibly check it up.

Q. You don't know now?

A. No, I don't.

Q. You wouldn't know, would you, whether one hundred dollars or a thousand dollars; could you give us any idea?

A. Would be somewhere in the neighborhood of eighteen hundred dollars, I believe.

Q. I just want it roughly. Was that the commission or what you got? Was that what you got or what you paid Mr.—

A. Mr. Rajotte.

Q. What you paid Mr. Rajotte. You say there was a contract between you and Mr. Hawkins?

A. Yes.

Q. Was it a letter?

A. Yes, it was a letter.

Q. You wrote him a letter or he wrote you?

A. He wrote us.

Q. You had talked to him orally about the bridges?

A. Mr. Shay?

Q. Someone from your company talked with him?

A. Yes.

Q. And he wrote you this letter telling you to do the work?

A. Yes.

Q. You don't know how long before this letter, do you? You don't know how long it was?

A. No, I don't, must have been very shortly before that letter was written.

Q. Let me read this letter to you, letter on the stationary of the Whitney Company, 907 Lewis Building, Porland, Oregon, dated October 19th, 1919.

Shay and Parker,
C/o Rajotte-Fobert & Winters,
Bay City, Oregon.

Dear Sirs: On the basis of our furnishing all the material at the bridge site, we accept your bid for the following unit prices: Piling 25 cents per lineal foot in leads. Lumber, twenty-five dollars per thousand foot in place. These prices are to include all driving and placing of all iron, and all labor incidental to finishing complete the bridge structure at Kilches River, Clear Creek

and Sam Down's Creek. Mr. Rajotte of Rajotte, Fobert & Winters assures me that your men will be boarded at going prices per day per man. We urge you to start this work as promptly as possible and we are giving you the contract based upon your starting your machinery over there within a very few days. We sincerely hope our relations will be pleasant and we will do all we can to aid and assist you."

Wasn't this the contract—it is of no particular importance?

A. No, I think there was another one. I believe I got that after going to Bay City.

Q. Well, it is no different from this, is it?

A. No.

Q. We have no other copy; that is the reason.

A. No different.

Q. Now, Mr. Hawkins is urging you in that letter to do all you could to get the bridges done, wasn't he?

A. Yes, sir.

Q. Do you know of anything that Mr. Hawkins or the Whitney Company, the defendant in this case, did to keep you from getting the bridges along?

A. The Whitney Company were supposed to furnish that material to the bridge site, which they didn't do.

Q. What do you mean at the bridge site?

A. That would mean where the bridge was to be driven or built.

Q. Who furnished it there? Who brought it up there if they didn't?

A. The Rajotte-Winters Company brought most of it.

Q. You remember Mr. Henry Sauce?

A. Yes.

Q. Did he ever bring any of it out?

A. Yes, sir.

Q. For whom was he working?

A. He was working for Whitney. I am talking about Kilches River; that is the first bridge.

Q. You are taking the bridges one at a time?

A. Yes, the Kilches River bridge.

Q. You were there, ready to work but couldn't.

A. Oh, no, were not ready to work, but we were detained. The stuff came out piecemeal, you understand.

Q. How much delay would you say you were caused?

A. Well, it would be hard to say.

Q. How long were you building the Kilches River bridge?

A. We were there a month or better.

Q. Out of that month, how long did the Whitney Company delay you?

A. Well, I would make a guess of five or six days.

Q. They delayed you in five or six days. In other words, you would have finished the bridge five or six days sooner if they had had the lumber at the Kilches?

A. I would think so.

Q. Why didn't they have it there, do you know? You were down there; do you know? Do you have any idea?

A. I don't think they had the facilities for taking it there; it had to be hauled in on wagons.

Q. That roadbed was not in condition then as I understand it, for the Whitney Company to bring it up on the roadbed?

A. No, sir.

Q. Who is building that roadbed?

A. Rajotte-Winters.

Q. Kilches is the first bridge?

A. Yes.

Q. What was the steam shovel doing during the Kilches delay—during that time?

A. I believe they were taking that to do some ballasting.

Q. I understood you to say that during that time they did go back on the shovel work?

A. Yes, sir.

Q. They were not standing there waiting to get across, then?

A. No.

Q. Now, at Clear Creek how long was the steam shovel delayed?

A. I would imagine somewhere in the neighborhood of a week.

Q. Let me ask you this: See if this refreshes your memory: Suppose our records would show that the shovel was delayed at Clear Creek three working

days and one Sunday, April 2nd, 3rd, 4th and 5th, 1920?

A. That might be true.

Q. I mean, of course, you are not trying to falsify. I wonder if you can remember anything about that?

A. No.

Q. That wouldn't help you to remember whether they were delayed a long time or a little time?

A. No, sir.

Q. What was the steam shovel doing when it was delayed at Clear Creek? Was it standing there?

A. I think so, yes, sir.

Q. Do you know whether or not it was being repaired during that time?

A. I believe the repairs came later.

Q. You don't know?

A. I don't know, sir.

Q. You can't say that the repairs were not being made on it at that time?

A. No, sir.

Q. You know that at intervals steam shovels have to be repaired, don't you?

A. Yes, sir.

Q. And they have to be shut down and taken off the work at that time?

A. Yes sir.

Q. And, if it is a fact—I don't commit you to that—but if it is a fact that the shovel while waiting to cross over Clear Creek bridge which you were building, was being repaired, then you wouldn't say

that it delayed the Rajotte people very much, would you?

A. Well, I don't know that it was being repaired.

Q. No, I know you don't. But, if it is a fact that it was repaired during that time, you wouldn't say that it delayed the Rajotte people?

A. No; that is, if it was necessary.

Q. I presume they wouldn't make them on our money if it wasn't necessary. At Sam Down's Creek, how long would you say that the shovel was delayed?

A. I don't remember.

Q. Well, if our records show, and if we establish before the court, that the shovel was delayed four working days, August 20th, 21st, 23rd and 24th—evidently a Sunday in there—1920, would that recall anything to you as to the time?

A. That probably is right. My recollection would be that that delay was a little longer than that.

Q. Then you think the delay was longer than that?

A. Yes, sir, I think so.

Q. Do you remember what the shovel was doing during that delay?

A. I believe it was being repaired there.

Q. That is your impression, it was being repaired?

A. I think so.

Q. Now, at Sam Down's Creek are you certain that the delay occurred while you were at work on the bridge at Sam Down's Creek?

A. I think so.

Q. Was any delay caused when you were across the bridge building that trestle—what did you call it, the approach or temporary trestle?

A. Temporary trestle, that must have been what was holding us.

Q. Then, you mean to tell the Court now, that the delay was in building a temporary trestle, not in building the bridge proper, is that it?

A. It would be practically the same.

Q. I would like to have you divide that to the Court; I put a good deal of significance in it.

A. I am not sure. I think at the time we were building this temporary trestle decking was being put on the permanent structure.

Q. But you are not prepared to say, then, which I thought you meant to say at first just now, that delay occurred when the temporary trestle was being built?

A. No, no, I am not.

Q. You are not prepared to say that the delay was not caused by your work on the temporary trestle?

A. No.

Q. I am sorry you haven't what you call your contract; I was going to ask you—you probably know anyway—was there anything in your contract which called on you to build the temporary trestle?

A. No, sir; no, sir.

Q. When you built the temporary trestle whom were you working for?

A. I believe for Whitney Company.

Q. Why did you build the temporary trestle if the contract didn't call on you to build it?

A. It was necessary to build this trestle in order to get the steam shovel across; it would really be a continuation of the main bridge.

Q. But the contract was for building a bridge?

A. Yes, sir.

Q. And not for building temporary trestle. The Court is not a bridge builder. I want him to understand if it is a fact there is a difference between a temporary trestle and a bridge?

A. There is, yes.

Q. Tell the Court what a temporary trestle is.

A. A temporary trestle, I believe, at the end of this bridge, if the shovel were moved out to the end of this bridge, it would be somewhere in the neighborhood of twenty feet in the air. In order to get it over where the borrow pit or the next cut would be, you would have to build something to let it off on, and that was the occasion for this temporary trestle, as I understand it.

COURT: The space where the temporary trestle was, was that subsequently filled with earth?

A. Yes, sir.

Q. You don't know whether or not the Rajotte-Fobert-Winters Company, the plaintiff in this case, paid you for building the temporary trestle?

A. I don't think they did.

Q. That is, they didn't pay you directly; I understand that; but you don't know how that was handled

between the Whitney Company and the Rajotte people, do you?

A. I am quite sure that Mr. Norris asked me to build the bridge—do the temporary work.

Q. I mean to ask you, you don't know as between the two, how that temporary trestle work was handled, do you?

A. I do not.

Q. Have you ever read this contract between the Whitney Company and the plaintiff in this case?

A. No, sir.

Q. Do you not know that you were paid force account plus ten per cent for the building of the trestles?

A. Yes, sir.

Q. Were you paid any different for building trestles than you were for building the bridges?

A. You mean for the temporary work?

Q. Yes.

A. That was cost plus ten per cent temporary work.

Q. How were you paid for the bridges?

A. On the contract as you just read it.

Q. You built the temporary trestles under a different plan?

A. Yes, sir.

Q. You got cost plus ten per cent?

A. Yes, sir.

Q. You understand that is what builders call force account, don't you?

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. Who sent you your check for that?

A. The Whitney Company paid us.

Q. And added ten per cent; reimbursed you plus ten per cent?

A. Yes, sir.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Now, these temporary trestles you refer to, Mr. Parker, isn't it a fact that you had to construct some of these temporary trestles in connection with the building of these bridges?

A. One at Sam Down's we had to build in order to get on the bridge.

Q. In other words, that was a part of the bridge building, was it not?

A. Yes, sir.

Q. You had to use that to get your pile driver out to the bridge part of it?

A. Yes.

Q. Mr. Freed asked you the manner in which you were to get your materials down to this bridge; at the time you made this contract with the Whitney Company, did they tell you that the material had to be hauled over this roadbed that the plaintiff was grading in this case?

A. No, sir.

Q. How were you to get the materials there?

How did they contemplate getting them there? Wasn't there a wagon road?

A. Was a wagon road, yes.

Q. Were any of the materials hauled by team or wagon?

A. Yes, sir, most of the bracing and caps were hauled by team and wagon; what I want to get, Mr. Parker, would it have been possible to construct these bridges if there had been no railroad in there?

A. Would have been quite difficult to get the stringers in.

Q. What part of these bridges could you have built and had ready before you would need what you would call the stringers?

A. You would have all the piles driven and capped, capped and braced. You would have it all done but the decking.

Q. What part of that would require the most time?

A. The driving and bracing.

Q. Would it have been necessary to have a railroad in there to do the piledriving?

A. No; the piledriving was done before the railroad was in.

Q. Now, you say that Mr. Norris asked you to build this temporary trestle; was that the Clear Creek or the Kilches?

A. There was a little one at Sam Down's and also at Clear Creek.

Q. The Rajotte-Winters Company didn't ask you to do this, did they?

A. I don't think they did; I am quite sure they didn't.

Q. At the time Mr. Norris asked you to build these temporary trestles, did he state to you the reason?

A. Mr. Norris, as I remember it, asked me to build one at Sam Down's Creek, the other one I built on my own in order to get the piledriver out, you see.

Q. That was your own work?

A. Yes.

Q. Part of your bridgebuilding work?

A. Yes.

Q. Aside from the one Mr. Norris asked you to build, and this one you had to build in connection with your own operations there were not others built, is that true?

A. We built small ones, that we built for the Rajotte-Winters Company.

Q. Which one of the bridges was that?

A. Short, temporary trestle.

Q. Wasn't in connection with either one of these?

A. No; wasn't a bridge.

RECROSS EXAMINATION

Questions by MR. FREED:

Q. Mr. Parker, don't you think that the Whitney Company was doing all it could to further and hasten the building of these bridges?

A. I believe they were very anxious to get it done, yes.

Q. Didn't they pay force account, extra that is to say, for moving your outfit from one bridge to another at one time?

A. They paid me for taking part of the bridge up.

Q. That is, moving it up there?

A. Yes, I took part of my material with me.

Q. That was pretty expensive on the Whitney Company, wasn't it?

A. I believe that was less than what they afterwards paid for the balance of it.

Q. That showed they were not holding back on account of expense, didn't it?

A. I would much rather have taken the whole bridge as I went, the first pull, had it in there.

Q. Did you at any time request anything of the Whitney Company that would hasten your work, that you didn't get? Did they refuse to do things for you?

A. No, no, just a matter of time; it wasn't being done on time.

Q. What wasn't being done on time?

A. This material; for instance, even at Clear Creek we waited for material, and at Clear Creek Mr. Sauce brought up part of our piling.

Q. How did Mr. Sauce bring that up?

A. Floated it up the river with a horse.

Q. Did he have to do that?

A. That's about the only way he could have gotten it there.

Q. Is that a slow or a fast process?

A. It is slow.

Q. That was about the only way you say you could bring up material to that point?

A. Yes.

Q. To bring it up the bed of the river?

A. Yes.

Q. Tell the Court what the Whitney Company did to get that out there; just what the man did to bring it out?

A. Brought it out with a horse, I think, about four or five piles at a time, with a cable, some hundred and fifty feet of cable, he would hitch the horse to this line in the shallow spots; stretch his line out to catch each shallow spot in the stream. The horse went up the river bed dragging this piling.

Q. Did you ever see any greater effort made to bring up piling than that?

A. Yes.

Q. What?

A. It was quite a difficult proposition.

Q. There is no question about that?

A. Nothing at all.

Q. By paying more, the Whitney Company couldn't have gotten that up there any more rapidly?

A. I don't—they might have put on more help—they might have put more help in; by using two or more horses it could have been done faster.

Q. That is to say, if you had used twenty-five men on your bridge, where you used two, you could have finished the bridge more rapidly?

A. Yes.

Q. Or if the Rajotte-Winters had put on a hundred and twenty-five men on their job and say they used one hundred, they could have finished there faster?

A. Exactly.

Q. I will put the question this way; since you were down there to observe it.

COURT: Didn't the Whitney Company show that it was trying to co-operate to get this thing done, or did it?

A. The fact remains that it wasn't done.

Q. You can answer no if you think they didn't.

A. Well, they had this one man, and one horse, hauling the piling.

Q. You don't think, then, that the Whitney did do, that is what you are saying—you don't think they did co-operate?

A. Well, they could have by putting more force on.

Q. Well, just as you could build your bridge faster if you would put more on—you could have saved that five days; did you expect them to put more men coming up the river?

A. I did.

Q. Did you tell them that?

A. Absolutely.

Q. Who refused? Who did you tell that?

A. Mr. Norris.

Q. You told Mr. Norris he ought to put more men bringing this up the river?

A. I told him we were short of material.

Q. Did you tell him he ought to bring? What did you tell him?

A. I told him we were short of material and we needed it; it was laying us idle, you see.

Q. What did he say?

A. I don't remember.

Q. I would like to get that conversation. Mr. Norris is going to be on the stand a little later in the case. You said to him that you were being delayed, that you were delayed because you didn't have enough material up there?

A. Yes, sir.

Q. Did you suggest to him how to get it up the river?

A. I did not.

Q. How did you expect to have that material brought to you?

A. That was none of my work.

Q. I know that, but you must have had expectations as to how to get that stuff up there.

A. When we went up there, if we could have had the entire bridge, I believe we could have taken it up with one pull of the drivers. We took part when the driver went up, by building a raft of part of the material and putting the driver on, and pulling ourselves up with our own steam. We trailed two rafts of piles behind us.

Q. Is that the first bridge you talked about, the Kilches?

A. At the Kilches River the stuff was hauled out by wagons. And as I remember it was possibly eight or ten piles on the ground when the driver got there.

Q. And you and your crew sat idle while waiting for the material?

A. No, in cases got our own material.

Q. Where did you get that?

A. Went there and hauled it up.

Q. Got paid for that?

A. Yes.

Q. The Whitney Company paid you?

A. Yes.

Q. What about the next bridge? That was the first bridge you spoke about, that was the Kilches River bridge?

A. Yes, sir.

Q. What about the next one, Clear Creek?

A. The next one is where—

Q. Yes, Mr. Sauce.

A. Yes, Mr. Sauce's part.

Q. What about Sam Down's bridge?

A. I think Mr. Sauce brought that up also.

Q. What was your crew doing while you were waiting to get the material? Did you just sit idle?

A. In some cases, yes, sir.

Q. All your crew?

Y. Yes.

Q. You don't remember how long you sat idle?

A. No, sir, I don't.

REDIRECT EXAMINATION

Questions by MR. DOBSON:

Q. Your crew was not being paid unless they were working, were they?

A. No, sir.

Q. As I understand, you had those contracts at so much per bridge?

A. In the event the crew were idle for some portion of an hour or two hours they were not docked that time.

Q. What I want to bring out, would the Whitney Company lose this time that they were not working?

A. No, it would be myself that would lose it.

Q. It would be your loss?

A. Yes, sir.

Q. Mr. Freed asked you, and I think you answered rather quickly, without considering, made the statement if the plaintiff had put on more men up there they could have put on their work quicker. You are not informed about that in detail?

MR. FREED: He said he was.

MR. DOBSON: I am asking; I don't think he understood.

A. You mean—

Q. Well, the work as a whole?

A. Why, most assuredly.

Q. What you mean to say, if they put on more men to do the work that would be done by steam shovel?

A. Any job if you double the crew.

Q. Would have to put on two steam shovel plants, too?

A. I presume.

Q. In other words, there is a limit to the number of men you can work on a steam shovel plant?

A. Yes.

Q. And you wouldn't expect them to go up there and do the work by hand they could do with the steam shovel, would you?

A. No.

Q. Now, the organization or getting prepared to carry on operation of that kind, having everything taken into consideration, you decided upon the equipment you were going to use and carry to meet the condition, don't you, in the beginning?

A. Yes, sure.

Q. Having in mind the work you were going to do?

A. Yes.

Q. After having done that, would there be any economy in doubling up the crew?

A. I wouldn't see any economy around a steam shovel.

Witness excused.

WILLIAM McKINLEY, a witness called on behalf of plaintiff, beign first duly sworn, testified as follows:

Questions by MR. DOBSON:

Q. What is your business?

A. I am connected with the Whitney Company.

Q. Are you in their employ at the present time?

A. I am.

Q. Were you in their employ at the time the plaintiff was engaged in the construction of the roadbed in Tillamook County?

A. I was.

Q. And what were your duties at that time?

A. I was in charge of the Portland office.

Q. What particular work did you do there?

A. Well, I did the buying and looking out for the accounting end.

Q. What I want to get at is, were you in charge of the accounting?

A. It was done under my direction, yes.

Q. Are you familiar with the books of account of the Whitney Company?

A. I am.

Q. And are you able to identify the handwriting in the books if they were kept in that manner, or did you do the actual bookkeeping?

A. No, but I am familiar with them.

Q. Are you able at this time by referring to your books to give us a statement of the cost of the construction of this roadbed that is insofar as the work was done by the plaintiff in this case—the cost of the work done by the plaintiff?

A. I can give—I don't know as I exactly understand.

MR. FREED: Use the statement that you made

up. Maybe he can answer your question; he made up a statement.

Q. Did you make up a statement showing the cost of the plaintiff's operations in connection with the building of that roadbed?

A. I made up a statement of the amount we reimbursed them for, and what we paid them, what their cost might have been; I have a statement of that.

Q. Do you have it where you can get it?

A. I have it there.

Q. In the court room?

A. Yes.

Q. You heard Mr. Martin's testimony, didn't you?

A. I did.

Q. Heard his testimony as to the amount of vouchers that were paid by your company?

A. I did.

Q. Was the amount substantially correct?

A. Substantially correct. Some slight variation.

Q. Now, you heard Mr. Martin state in detail what items he considered to make up that amount, that is to say, labor?

A. I did.

Q. Are there any other items which were expended in connection with the plaintiff's operation here which you show that he didn't mention?

A. Well, I don't believe so; I haven't checked it in that respect.

Q. Have you any record as to the amount of coal

that was purchased for the work that was being done by the Rajotte-Winters Company to keep their steam shovel going?

A. You mean what we ourselves purchased?

Q. Yes, in connection with their operation.

A. I haven't that record, no; I have the record of the amount we reimbursed Rajotte for what he had paid for coal.

Q. Isn't it a fact that you purchased certain materials, certain articles, which under your contract with plaintiff you were required to furnish?

A. We did.

Q. You purchased that direct?

A. I did.

Q. And by handling in that manner there was no necessity for reimbursing the plaintiff, that is, you wouldn't reimburse him for that?

A. No.

Q. Weren't those things that you purchased added to the cost of the work?

A. They were added to the cost of the railroad, yes.

Q. Weren't they added to the cost of the work that was done by the plaintiff in this case?

A. They weren't, no.

Q. Weren't those things—

A. That is, those purchases added to the payments to Rajotte went to make up the cost of the grade, yes.

Q. The plaintiff was operating a steam shovel

plant, was it not, during all the time it was engaged upon this work; isn't that correct?

A. Yes, practically.

Q. Isn't it a fact that the Whitney Company purchased the coal, furnished the coal, for that steam shovel plant?

A. All but an initial car or two.

Q. Do you have any idea as to the amount of money that was expended by the Whitney Company for coal during that time the plaintiff was building this roadbed, or can you refer to your books and get that amount?

A. I can, yes; I haven't it in my head.

Q. This statement that you have prepared, have you segregated those items in any way so you could refer to them readily at this time?

A. I didn't segregate them with that idea in mind; the segregation that I have made is made up for the purpose of showing what was paid to the plaintiff and detail of that.

Q. Now, in the answer filed by defendants in this case to plaintiffs' complaint the allegation is made that the total cost of this roadbed was a hundred fifty-six some odd thousand dollars. Did you have to do with making up those figures?

A. Yes, sir.

Q. Now, in arriving at that amount, did you include the amount that was expended by the defendant for coal?

A. No, sir.

Q. Did you include the amount that was ex-

pended by the defendant for groceries, for the camps of the plaintiff?

A. No.

Q. And did you include the amount expended for powder, explosive powder for blasting purposes?

A. There is nothing included in that that is not included in the reimbursement to Rajotte-Fobert and Winters.

Q. Can you refer to this sheet you made up and tell the Court how much you reimbursed the plaintiff for in this case on their payroll account?

A. No, the segregation wasn't made that way. We lumped everything, this payroll and what vouchers they presented, and added them together, and the statements I prepared, as I say, were not prepared with that in mind.

Q. Now, Mr. McKinley, do you recall at the beginning of the work when the plaintiff started this operation there, that for a time they purchased their own groceries?

A. They did.

Q. And you reimbursed them for the groceries they purchased?

A. We did.

Q. The same as you reimbursed them for labor?

A. Yes.

Q. Isn't it a fact that later the Whitney Company decided to purchase the groceries on its own account?

A. They did.

Q. And deliver them to the plaintiff?

A. They did.

Q. You are not able to state at this time, or can you refer back, and state the amount paid by defendant for groceries subsequent to the time the buying of groceries was taken over by defendant?

A. Before I answer any line of questions along this line, Mr. Dobson, I would have to be prepared. I haven't gone into that along that line.

Q. I am not trying to get you into any difficulties.

A. I know you are not, but I am explaining I can't do it.

Q. I understood you had made detailed statement of the various items that went into the cost of building this roadbed, or rather, the work that was done by plaintiff.

A. I have, but along another line; it doesn't go into the details you are asking for.

Q. Did you segregate the ballast contract and the rail laying contract in this amount incorporated in defendant's answer?

A. They were excluded.

Q. They were excluded?

A. Yes.

Q. I will ask you whether or not you can, before the close of this case, or say tomorrow morning, furnish me a statement defendant expended for groceries and for coal and for blasting powder and other blasting materials during the time the defendant was engaged on this work?

A. Yes, I can.

Q. Can you have that in the court room tomorrow morning, or could you get it this afternoon?

A. It would take two or three hours to make it up.

Q. Take how long do you say?

A. Take two or three hours to make it up.

Q. You could have it by tomorrow morning?

A. Yes, I think so.

Q. Now, in the beginning, when you reimbursed the plaintiff for the purchases they had made, particularly the groceries, did you add a per cent of profit to the amount of these purchases?

A. We did.

Q. Did you, after this work was taken over, or rather after the purchase of groceries and supplies was taken over by your company, did you make any accounting to the plaintiff with respect to the percentage on groceries and other items that you paid?

A. Well, we had some correspondence concerning these supplies, but as to strict accounting, I don't know whether we ever did. We were paying out the money, and I don't remember whether or not we did ever give them a complete statement of it.

A. Well, you will be able to give me that statement tomorrow, you think?

A. I can give you the total.

Q. Just the totals for groceries, blasting materials and coal.

A. Yes, sir.

MR. DOBSON: That is all at this time, reserving the right to recall Mr. McKinley for that purpose tomorrow morning.

CROSS EXAMINATION

Questions by MR. FREED:

Q. Why did the Whitney Company see fit to take over the purchase of groceries in this case, tell the Court?

A. Because the contractors were buying them from a little retail store down there, and paying excessive prices, and we didn't figure it was good business and for that reason we took it over and bought them wholesale, thought to save money.

Q. The contractor was buying them from a store where?

A. At Bay City.

Q. Buying them at a retail store?

A. Yes.

Q. Where did the Whitney Company buy them when they took over that part?

A. We bought them from a wholesale house in Portland, Mason-Ehrman Company.

Q. Do you know approximately what was saved on groceries by that?

A. Well, a big percentage. I am not prepared to answer that definitely.

Q. You have read the contract?

A. I have.

Q. Does the contract provide in respect to whether or not any percentage profit was to be paid to plaintiff on account of fuel and blasing powder, for instance?

A. It provides specifically that no percentage was to be paid.

Q. That is, no percentage profit was to be paid for it?

A. No percentage profit was to be paid on those items.

Q. And that is the reason that was not included in the answer?

A. Yes.

Q. Now, I want to go back to the question I asked you a few moments ago, in regard to the reason for the Whitney Company taking over this grocery account. Will you explain to the Court, if you know, the operation of what you people call the cookhouse under the plaintiff in this case which required you to take it over?

A. Well, the whole—

Q. That is, amplify your answer that you made a while ago.

A. The cookhouse was being run at a loss, and one of the causes of the loss was the excessive prices paid for groceries and supplies, and was with the object in mind of cutting out that portion of the loss and saving money, of course, that we took that over and bought the groceries ourselves.

Q. Well, was the cookhouse after that operated at a loss?

A. I don't know, Mr. Freed, whether it actually came out of the red, but we operated at a considerable less loss. Whether or not it ever got out completely, I can't say without reference to the record.

Continued in Vol. II.